TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907

No. 4[redacted]150.

J. B. BEADLES, PLAINTIFF IN ERROR AND APPELLANT,

vs.

A. E. SMYSER, MAYOR; G. R. BYERS ET AL., CITY COUNCILMEN, AND W. R. FRY, CITY TREASURER, OF THE CITY OF PERRY, NOBLE COUNTY, OKLAHOMA.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED NOVEMBER 7, 1908.

(20,449.)



(20,449.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 484.

J. B. BEADLES, PLAINTIFF IN ERROR AND APPELLANT,

vs.

A. E. SMYSER, MAYOR; G. R. BYERS ET AL., CITY COUNCILMEN, AND W. R. FRY, CITY TREASURER, OF THE CITY OF PERRY, NOBLE COUNTY, OKLAHOMA.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

INDEX.

	Original.	Print.
Caption	*a*	1
Return on writ of error and appeal	*b*	1
Citation and service	*c*	2
Petition for appeal and writ of error	1	3
Assignment of errors	4	5
Affidavit of amount in controversy	8	7
Order allowing writ of error and appeal	10	8
Writ of error	12	9
Bond on writ of error and appeal	14	11
Petition in error	17	12
Case-made from district court	19	13
Petition for mandamus	21	14
Alternative writ of mandamus	36	23
Motion for extension of time to answer	51	31
Answer	53	32
Amended answer	54	33
Motion for judgment by plaintiff	55	34
Motion for judgment by defendant	56	34

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 1, 1907.

	Original.	Print.
Order overruling plaintiff's motion for judgment and sustaining defendants	58	35
Motion for new trial	60	36
Judgment	62	37
Attorneys' certificate to case-made	64	38
Acceptance of service of case-made	65	38
Judge's certificate to case-made	66	39
Waiver of summons in error	67	40
Hearing and submission	69	40
Judgment	70	41
Opinion	71	41
Clerk's certificate	73	43
Writ of error	74	44

a No. 1930.

J. B. BEADLES, Plaintiff in Error and Appellant,
vs.
A. E. SMYSER, Mayor, *et al.*, Defendants in Error and Appellants.

Writ of Error and Appeal from the Supreme Court of the Territory of Oklahoma to the Supreme Court of the United States.

b In the Supreme Court of the United States.

Number —.

J. B. BEADLES, Plaintiff in Error and Appellant,
vs.
A. E. SMYSER, Mayor; G. R. BYERS, W. B. BRENGLE, A. C. HINDE, HARRY SHORTMAN, CHAS. CHRISTOPH, E. J. MILLER, D. R. MARSHALL, J. H. FLOOD, City Councilmen, and W. R. FRY, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory, Defendants in Error and Appellees.

Return on Writ of Error and Appeal.

In pursuance to the command of the writ of error and appeal within, I, Benjamin F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, herewith transmit a true and correct copy of the opinion and judgment of the Supreme Court of the Territory of Oklahoma, together with a true copy of all of the records and proceedings, and all pleadings, papers and files in said cause filed and recorded in my office as Clerk of said court in the above entitled cause; and I also transmit herewith a copy of the assignment of error and the original writ of error and appeal and citation and proof of service thereon in said cause, lately pending in the Supreme Court of the Territory of Oklahoma, all under my hand and the seal of said court.

Witness my official signature and the seal of the said Supreme Court of the Territory of Oklahoma, at the City of Guthrie, in said Territory of Oklahoma, this 8th day of October, in the year of our Lord one thousand nine hundred and six.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

c In the Supreme Court of the United States.

Number 1930.

J. B. BEADLES, Plaintiff in Error and Appellant,

vs.

A. E. SMYSER, Mayor; G. R. BYERS, W. B. BRENGLE, A. C. HINDE, HARRY SHORTMAN, CHAS. CHRISTOPH, E. J. MILLER, D. R. MARSHALL, J. H. FLOOD, City Councilmen, and W. R. FRY, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory, Defendants in Error and Appellees.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to A. E. Smyser, Mayor; G. R. Byers, W. B. Brengle, A. C. Hinde, Harry Shortman, Chas. Christoph, E. J. Miller, D. R. Marshall, J. H. Flood, City Councilmen, and W. R. Fry, City Treasurer, of the City of Perry, Noble County, Oklahoma, Greeting:

You and each of you are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error and appeal filed in the Clerk's office of the Supreme Court of the Territory of Oklahoma, wherein J. B. Beadles is plaintiff in error and appellant and you are defendants in error and appellees, to show cause, if any there be, why judgment rendered against said plaintiff in error and appellant as in the said writ of error and appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John H. Burford, Chief Justice of the Supreme Court of the Territory of Oklahoma, this 8th day of October, 1906.

[Seal Supreme Court, Territory of Oklahoma.]

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest:
BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

I, the undersigned attorney of record for A. E. Smyser, Mayor, and G. R. Byers, W. B. Brengle, A. C. Hinde, Harry Short-
d man, Chas. Christoph, E. J. Miller, D. R. Marshall, J. H. Flood, City Councilmen, and W. R. Fry, City Treasurer of the City of Perry, Noble County, Oklahoma Territory, in said cause mentioned in the Supreme Court of the Territory of Oklahoma, and

also City Attorney of the City of Perry, Noble County, Oklahoma Territory, duly authorized to appear and defend the said City in the above entitled cause, do hereby acknowledge service of the above and foregoing citation this 15th day of October, A. D. 1906.

A. N. WHITESIDE,

Attorney of Record for A. E. Smyser, Mayor, and All of the said Other Parties, Defendants in Error and Appellees; also the City Attorney of the City of Perry, Noble County, Oklahoma Territory.

c [Endorsed:] 1930. J. B. Beadles, pl'ff in error and appellant, *vs.* A. E. Smyser *et al.*, def'ts in error and appellees. Citation. Filed Oct. 15, 1906. Benj. F. Hegler, clerk, Supreme Court.

1 In the Supreme Court of the United States.

Number 1930.

J. B. BEADLES, Plaintiff in Error and Appellant,

vs.

A. E. SMYSER, Mayor; G. R. BYERS, W. B. BRENGLE, A. C. HINDE, HARRY SHORTMAN, CHAS. CHRISTOPH, E. J. MILLER, D. R. MARSHALL, J. H. FLOOD, City Councilmen, and W. R. FRY, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory, Defendants in Error and Appellees.

Petition for Appeal and Writ of Error.

To the Honorable Supreme Court of the Territory of Oklahoma:

The above named plaintiff in error and appellant, conceiving himself aggrieved by the judgment of the Supreme Court of the Territory of Oklahoma rendered on the 6th day of September, 1906, affirming a judgment of the District Court of Noble County, Oklahoma Territory, in rendering and entering a certain judgment for the defendants in error and appellees and the orders therein made for the recovery against this plaintiff in error and appellant, affirming a judgment of the District Court of Noble County, Oklahoma Territory denying the application of plaintiff in error and appellant for the writ of mandamus prayed for in the petition in said cause, and in which petition it was prayed that a writ of mandamus issue against the said defendants A. E. Smyser, as Mayor of the City of Perry and the said other defendants as the Councilmen and City Treasurer of the City of Perry, directing and commanding them and each of them to recognize certain outstanding judgments of the plaintiff against the City of Perry in the sum of Sixteen Thousand, Three Hundred Four and fifty-one hundredth Dollars
2 ($16,304.51), exclusive of interest accruing from February 1, 1906, as valid and subsisting judgments against the City of Perry, Noble County, Oklahoma Territory, and in overruling

the motion of plaintiff in the trial court for judgment upon the return of the defendants to the alternative writ of mandamus, and in sustaining the motion of defendants in the trial court for judgment in favor of the defendants upon the alternative writ of mandamus, and in giving judgment for the defendants in the trial court in said cause, and dismissing the plaintiff's cause and denying the alternative writ of mandamus prayed for, and in not rendering judgment in said cause for the plaintiff in error and appellant upon the record made therein. And this plaintiff in error and appellant does hereby prosecute proceedings upon appeal and writ of error from the said orders, judgments and decrees of the Supreme Court of the Territory of Oklahoma to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith and made a part hereof, and prays that the appeal and writ of error may be allowed, and that the transcript of the record, proceedings, and papers, upon which said judgment of affirmance was made, duly authenticated by the Clerk of this court, may be sent to the Supreme Court of the United States, and that the court may fix a supersedeas bond of the said plaintiff in error and appellant to be given within a reasonable time and enter the necessary orders herein, allowing and effecting proceedings upon appeal and in error, and that the said judgment of the Supreme Court of the Territory of Oklahoma may be reversed and a judgment and decree be made, remanding said cause for the further proceedings upon appeal and in error in the Supreme Court of the Territory of Oklahoma and in the trial court, and for an order directing the granting of said peremptory writ of mandamus as prayed for in plaintiff's petition in said cause, and that such further decree may be made as to said Honorable
3 court may seem legal, just and proper.

S. H. HARRIS,
FRANK DALE,
A. G. C. BIERER,
Attorneys for Plaintiff in Error and Appellant.

Endorsed on back: 1930. J. B. Beadles, Pl'ff in Error and appellant, *vs.* A. E. Smyser, Mayor, *et al.*, Def'ts in Error, and Appellees. Petition for appeal and writ of error. Filed Oct. 8, 1906, Benj. F. Hegler, Clerk Supreme Court.

4 In the Supreme Court of the United States.

Number —.

J. B. BEADLES, Plaintiff in Error and Appellant,

vs.

A. E. SMYSER, Mayor; G. R. BYERS, W. B. BRENGLE, A. C. HINDE, HARRY SHORTMAN, CHAS. CHRISTOPH, E. J. MILLER, D. R. MARSHALL, J. H. FLOOD, City Councilmen, and W. R. FRY, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory, Defendants in Error and Appellees.

Assignment of Error.

J. B. Beadles above named, complainant, plaintiff in error and appellant, hereby assigns error on the judgment and decree of the Supreme Court of the Territory of Oklahoma in the above entitled cause, dated the 6th day of September, 1906, in the following particulars, to wit:

First. Because said court erred in its said ruling and decision in holding that in the absence of a statutory inhibition, an ordinary execution may issue on a judgment against a city of the first class in Oklahoma Territory.

Second. Because the said court erred in holding and deciding in said opinion that if an execution shall not be sued out upon, and within five years from the date of, a judgment against a city of the first class in Oklahoma Territory, then said judgment becomes dormant and ceases to operate as a judgment against such municipality.

Third. The said court erred in holding and deciding in said opinion that unless a judgment creditor under a judgment against a city of the first class and municipality in Oklahoma Territory causes an execution to issue upon said judgment within five years from the date of said judgment, then said judgment becomes dormant, invalid and void, and ceases to be an obligation of such city.

Fourth. Because the said court erred in ruling, holding and deciding that when the plaintiff in error and appellant failed to cause an execution to be issued out of the court rendering the judgments involved in said cause within five years from the date of said judgments, said judgments became dormant and ceased to be an
5 obligation of the City of Perry, and that the District Court did not err in refusing to enforce the said judgment against the City of Perry by mandamus, as prayed for.

Fifth. Because the said court erred in ruling, holding and deciding that when a judgment creditor in Oklahoma Territory fails to have execution issued within five years on a judgment against a city of the first class, and also fails to revive said judgments within one year after it becomes dormant, it will be treated as barred by the statute of limitations, and the court will deny the aid of mandamus to compel payment of the same.

Sixth. Because said court erred in ruling, holding and deciding that because the plaintiff or his transferror of the judgments sued upon failed to have execution issued within five years from the date of said judgments against the City of Perry, and also failed to, revive said judgments within one year after they became dormant, the said judgments were therefore treated as barred by the statute of limitation, and that the District Court held correctly in denying the aid of mandamus to compel the payment of said judgments.

Seventh. Because the said court erred in holding and deciding that the agreement between practically all of the judgment creditors of the City of Perry, Oklahoma Territory, that said city should pay such judgments in the order of priority of the date thereof instead of paying such judgment creditors their pro rata shares out of the money collected by taxation for the payment of said judgments, and which agreement was ratified and approved by a resolution of the City Counsel of the City of Perry, did not change the legal status of the City of Perry toward any of such judgment creditors, and did not excuse the judgment creditors from suing out an execution upon said judgments within five years of the date said judgments were rendered, or from securing a revivor of said judgments within one year after they became dormant.

Eighth. Because the said court erred in not holding and deciding that under the laws of the Territory of Oklahoma, the said judgments of the City of Perry set out in the alternative writ of mandamus, and each of them, were valid and subsisting judgments against the City of Perry, and were not dormant, and were not barred by the statute of limitations.

Ninth. Because the said court erred in not holding and
6 deciding that under the laws of the Territory of Oklahoma an execution could not be issued upon or to enforce a judgment or judgments against the City of Perry, Oklahoma, but the same could only be enforced by the levy of taxes each year to provide a fund out of which to pay such judgments.

Tenth. Because the said court erred in holding that the said judgments were barred by the statute of limitation, and in not holding that such judgments were not barred by the statute of limitation, and that the statute of limitation would not begin to run upon said judgments until moneys were provided by the levy of taxes for the judgment fund of the City of Perry for the purpose of paying said judgment obligations against the City of Perry, as provided by the laws of the Territory of Oklahoma.

Eleventh. Because the said court erred in not holding that the agreement between the judgment creditors of the City of Perry for the payment of said judgment obligations of the City of Perry in the order of rendition was valid and subsisting contract between the said judgment creditors and was approved by and binding upon the City of Perry, and that the City of Perry was estopped from its attempt to take advantage of the statutes of dormancy or of limitation in its attempt to defeat the enforcement of said judgments, and estopped from claiming that the said judgments had been barred by the statute of limitation or dormancy until a fund had been provided

under the law and under said contract for the payment of said judgments.

Twelfth. Because the court erred in not holding that the trial court, the District Court of Noble County, erred in not holding and deciding that the plaintiff, J. B. Beadles, was entitled to a judgment against the said Mayor, City Council and City Treasurer of the City of Perry for the enforcements of his said judgments as set out in his petition and prayed for therein, and in not holding that the plaintiff was entitled to the enforcement and collection of his said judgments in the sum of Sixteen Thousand, Three Hundred Four and fifty-one hundredths Dollars ($16,304.51) against the City of Perry.

Wherefore, the plaintiff in error and appellant prays that the judgment of the Supreme Court of Oklahoma Territory
7 herein may be reversed, annulled, and held for naught, and that the plaintiff in error and appellant may be restored to all things which he has lost by reason or on account of said judgment, and that the errors of the Supreme Court of the Territory of Oklahoma may be fully corrected, and that judgment be entered directing a reversal of said judgment, and that the peremptory writ of mandamus as prayed for by plaintiff in the trial court and plaintiff in error in the Supreme Court of Oklahoma and plaintiff in error and appellant in this court, be granted by order of this court.

S. H. HARRIS,
FRANK DALE,
A. G. C. BIERER,
Attorneys for Plaintiff in Error and Appellant.

[Endorsed:] 1930. J. B. Beadles, pl'ff in error and appellant, *vs.* A. E. Smyser, mayor, *et al.*, def'ts in error and appellees. Assignment of error. Filed Oct. 8, 1906. Benj. F. Hegler, Clerk Supreme Court.

8 In the Supreme Court of the United States.

Number 1930.

J. B. BEADLES, Plaintiff in Error and Appellant,
vs.
A. E. SMYSER, Mayor; G. R. BYERS, W. B. BRENGLE, A. C. HINDE, HARRY SHORTMAN, CHAS. CHRISTOPH, E. J. MILLER, D. R. MARSHALL, J. H. FLOOD, City Councilmen, and W. R. FRY, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory, Defendants in Error and Appellees.

Affidavit.

J. B. Beadles, being first duly sworn, says that he is the plaintiff in error and appel-ant in the above entitled cause, and that he is a resident of the City of Guthrie, Logan County, Oklahoma Territory and knows what the controversy in the above entitled cause is; that this

cause of action is one in mandamus to compel the payment of the judgments specified and set out in plaintiff's petition for a writ of mandamus and in the alternative writ of mandamus set out in the record in this cause, and that the judgments listed and specified in the said petition and alternative writ of mandamus amount, with interest figured to February 1, 1906, to the sum of Sixteen Thousand, Three Hundred Four and fifty-one hundredths Dollars ($16,304.51), and that the said judgments with accrued interest amounted, when the judgment and decision in said cause herein taken by writ of error and appeal to this court from the Supreme Court of the Territory of Oklahoma, when the same was rendered by the Supreme Court of the Territory of Oklahoma on September 6, 1906, to more than the sum of Sixteen Thousand, Five Hundred Dollars ($16,500.00), and that the amount involved in this controversy therefore exceeds $5,000.00, exclusive of interest and costs, and that no part of said judgments so sought to be enforced against the City of Perry,
9 Noble County, Oklahoma Territory, has been paid or remitted, and more than Sixteen Thousand, Three Hundred Four and fifty-one hundredths Dollars ($16,304.51) thereof, exclusive of interest from the date of said judgment remains due and unpaid.

J. B. BEADLES.

Subscribed and sworn to before me this 8th day of October, 1906.

MARIE E. TERRELL,
Notary Public.

[SEAL.]

My commission expires Nov. 18th, 1908.

Endorsed on the back as follows: 1930. J. B. Beadles, Pl'ff in Error and Appellant, *vs.* A. E. Smyser, Mayor, *et al.*, Def'ts in Error and Appellees. Affidavit of amount in controversy. Filed Oct. 8, 1906. Benj. F. Hegler, Clerk Supreme Court.

10 In the Supreme Court of the United States.

Number 1930.

J. B. BEADLES, Plaintiff in Error and Appellant,
vs.
A. E. SMYSER, Mayor; G. R. BYERS, W. B. BRENGLE, A. C. HINDE, HARRY SHORTMAN, CHAS. CHRISTOPH, E. J. MILLER, D. R. MARSHALL, J. H. FLOOD, City Councilmen, and W. R. FRY, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory, Defendants in Error and Appellees.

Order.

Now on this 8th day of October, 1906, comes the plaintiff in error and appellant by his attorneys, S. H. Harris, Frank Dale and A. G. C. Bierer, and files herein and presents to the court his petition for

writ of error and appeal and assignment of error, praying an allowance of a writ of error and an appeal, and that the transcript of the record and proceedings, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises; on consideration whereof the Court and the undersigned Chief Justice thereof, does allow a writ of error and an appeal, and directs and commands the Clerk of this Court to transmit to the said Supreme Court of the United States a true and certified transcript of the records and all papers, files and proceedings herein.

It is further ordered that the plaintiff in error and appellant shall give bond in the sum of One Hundred Dollars ($100.00), to be approved by the Clerk of this court, within twenty (20) days from this date, and upon so doing, these proceedings upon writ of error and appeal and the said bond shall operate as a supersedeas and as a stay of all the proceedings herein in the Supreme Court of the Territory of Oklahoma and in the District Court of Noble County,
11 Oklahoma Territory, pending said cause in the Supreme Court of the United States.

[SEAL.] JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Attest:
BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Endorsed on the back as follows:
1930. J. B. Beadles, Pl'ff in Error and Appellant, *vs.* A. E. Smyser, Mayor, *et al.* Def'ts in Error and Appellees. Order. Filed Oct. 8, 1906. Benj. F. Hegler, Clerk Supreme Court.

12 In the Supreme Court of the United States.

Number —.

J. B. BEADLES, Plaintiff in Error and Appellant,
vs.
A. E. SMYSER, Mayor; G. R. BYERS, W. B. BRENGLE, A. C. HINDE, HARRY SHORTMAN, CHAS. CHRISTOPH, E. J. MILLER, D. R. MARSHALL, J. H. FLOOD, City Councilmen, and W. R. FRY, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory, Defendants in Error and Appellees.

Writ of Error to and Appeal from the Supreme Court of the Territory of Oklahoma.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Supreme Court of the Territory of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said court before you, in

which the amount in controversy exceeds more than Five Thousand Dollars ($5,000.00), exclusive of interest and costs, and wherein it appears that a manifest error hath happened to the great damage of the said J. B. Beadles as by his complaint and assignment of error appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, command you that — judgment therein be given; that under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, with this writ, so that you have the same at Washington on the Seventh day of November next in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States and of said Territory of Oklahoma should be done.

It is further ordered and commanded that mandate and execution of said judgment of the Supreme Court of the Territory of Oklahoma be stayed until a final determination of this cause upon condition that the said plaintiff in error and appellant, J. B.
13 Beadles, enter into a good and sufficient undertaking to the defendants in error and appellees in the sum of One Hundred Dollars ($100.00), as required by law, within twenty (20) days.

Witness, the Honorable John H. Burford, Chief Justice of the Supreme Court of the Territory of Oklahoma, this 8th day of October, in the year of our Lord one thousand nine hundred and six.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Allowed:
JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

[Endorsed:] 1930. J. B. Beadles, pl'ff in error and appellant, *vs.* A. E. Smyser, mayor, *et al.*, def'ts in error and appellees. Writ of error to, and appeal from the Supreme Court of Oklahoma Territory. Filed Oct. 8, 1906. Benj. F. Hegler, clerk Supreme Court.

14 In the Supreme Court of the United States.

Number 1930.

J. B. BEADLES, Plaintiff in Error and Appellant,

vs.

A. E. SMYSER, Mayor; G. R. BYERS, W. B. BRENGLE, A. C. HINDE, HARRY SHORTMAN, CHAS. CHRISTOPH, E. J. MILLER, D. R. MARSHALL, J. H. FLOOD, City Councilmen, and W. R. FRY, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory, Defendants in Error and Appellees.

Bond on Appeal and in Error.

Know all men by these presents, That we, J. B. Beadles, as principal, and Robert Sohlberg as surety, are held and firmly bound unto A. E. Smyser, Mayor, *et al.*, defendants in error and appellees in the above cause in the full and just sum of One Hundred Dollars ($100.00) to be paid to the said A. E. Smyser, Mayor *et al.*, their certain attorneys, administrators and assigns, to which payment well and truly to be made, we bind ourselves, our executors, administrators and assigns jointly and severally by these presents.

Dated this 8th day of October, A. D. 1906.

Whereas, lately at a term of the Supreme Court of the Territory of Oklahoma, in a suit pending in said court, wherein J. B. Beadles as plaintiff in error and A. E. Smyser, Mayor, *et al.*, were defendants in error, judgment was rendered in said court on the 6th day of September, A. D. 1906, in favor of said defendants in error against said plaintiff in error, and the said plaintiff in error having obtained a writ of error and appeal to and from the Supreme Court of the United States for a reversal of said judgment, and an order of the Supreme Court of the Territory of Oklahoma staying mandate and execution of said judgment upon the giving by plaintiff

15 in error and appellant of a good and sufficient bond in the sum of One Hundred Dollars ($100.00), and citation having been issued upon said writ of error and appeal and served upon A. E. Smyser, Mayor, *et al.*, defendants in error and appellees, citing and admonishing said defendants in error and appellees to be and appear at the Supreme Court of the United States to be holden at the city of Washington the first Monday of December next.

Now, the condition of the above obligation is such that if the said J. B. Beadles shall prosecute his said writ of error and appeal to effect, and answer all damages and costs if he fails to make his writ of error and appeal good, then this obligation to be void, otherwise to remain in full force and virtue.

Witness our hands this 8 day of October, A. D. 1906.

J. B. BEADLES, *Principal.*

ROBT. SOHLBERG, *Surety.*

TERRITORY OF OKLAHOMA, *Logan County:*

Robt. Sohlberg, being duly sworn, says he is worth the sum of One Thousand Dollars ($1000.00) over and above all just debts, liabilities and exemptions.

ROBT. SOHLBERG.

Subscribed and sworn to before me this 8th day of October, 1906.

MARIE E. TERRELL,
Notary Public.

[SEAL.]

My commission expires Nov. 18th, 1908.

Approved by me this 8th of October, 1906.

BENJ. F. HEGLER,
Clerk, Supreme Court.

[SEAL.]

16 Endorsed on the back as follows: 1930. J. B. Beadles, Pl'ff in Error and Appellant, *vs.* A. E. Smyser, Mayor, *et al.*, Def'ts in Error and Appellees. Bond on Appeal and in Error. Filed Oct. 8, 1906. Benj. F. Hegler, Clerk Supreme Court.

17 In the Supreme Court of the Territory of Oklahoma.

Number 1930.

J. B. BEADLES, Plaintiff in Error,
vs.
A. E. SMYSER, Mayor; G. R. BYERS, W. B. BRENGLE, A. C. HINDE, HARRY SHORTMAN, CHAS. CHRISTOPH, E. J. MILLER, D. R. MARSHALL, J. H. FLOOD, City Councilmen, and W. R. FRY, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory, Defendants in Error.

Petition in Error.

Comes now the plaintiff in error, J. B. Beadles, and complains of said defendants in error above named, for that the said defendants in the District Court of Noble County, Oklahoma Territory, on the 2nd day of April, 1906, recovered a judgment by the consideration of said court against this plaintiff in error in a certain cause then pending in said court, wherein the said J. B. Beadles was plaintiff, and the said A. E. Smyser, Mayor, G. R. Byers, W. B. Brengle, A. C. Hinde, Harry Shortman, Chas. Christoph, E. J. Miller, D. R. Marshall, J. H. Flood, City Councilmen, and W. R. Fry, City Treasurer of the City of Perry, Noble County, Oklahoma Territory, were defendants, the original case made containing the records and all of the proceedings in said cause, duly certified and attested, is hereunto attached, marked Exhibit "A" and made a part of this petition in error; and the said J. B. Beadles, plaintiff in error, avers that there is error in said record and proceedings in this, to wit:

First. That said court erred in overruling the motion of plaintiff in error for judgment in his favor and for the issuance of a peremptory writ of mandamus upon the pleadings in said cause.

Second. Said court erred in sustaining the motion of the defendants in error for judgment denying the peremptory writ of mandamus prayed for upon the pleadings in said cause.

18 Third. The Court erred in not rendering judgment for the plaintiff in error and in not granting the plaintiff in error the peremptory writ of mandamus prayed for.

Fourth. The court erred in denying the peremptory writ of mandamus as prayed for by plaintiff in error.

Fifth. The court erred in rendering judgment for the defendants in error, denying the peremptory writ of mandamus as prayed for by the plaintiff in said cause.

Sixth. The court erred in overruling the motion of plaintiff in error for a new trial in said cause.

Wherefore, plaintiff in error prays that said judgment so rendered may be reversed, set aside and held for naught, and that a judgment may be ordered to be rendered in favor of the plaintiff in error and against the defendants in error, granting the peremptory writ of mandamus as prayed for by plaintiff in error, and that the plaintiff in error be restored to all rights he has lost in the rendition of said judgment, and for such further relief as to the court may seem just.

S. H. HARRIS,
DALE & BIERER,
Attorneys for Plaintiff in Error.

Filed April 20, 1906.
BENJ. F. HEGLER,
Clerk, Supreme Court.

19 In the District Court of Noble County, Oklahoma Territory.

Number 2261.

J. B. BEADLES, Plaintiff,
vs.
A. E. SMYSER, Mayor; G. R. BYERS, W. B. BRENGLE, A. C. HINDE, HARRY SHORTMAN, CHAS. CHRISTOPH, E. J. MILLER, D. R. MARSHALL, J. H. FLOOD, City Councilmen, and W. R. FRY, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory, Defendants.

Case-made.

Exhibit "A."
Filed April 20, 1906.

BENJ. F. HEGLER.
Clerk Supreme Court.

20 In the District Court of Noble County, Oklahoma Territory.

Number 2261.

J. B. BEADLES, Plaintiff,

vs.

A. E. SMYSER, Mayor; G. R. BYERS, W. B. BRENGLE, A. C. HINDE, HARRY SHORTMAN, CHAS. CHRISTOPH, E. J. MILLER, D. F. MARSHALL, J. H. FLOOD, City Councilmen, and W. R. FRY, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory, Defendants.

Case-made.

Be it remembered that heretofore, to wit, on the 12th day of March, 1906, said plaintiff J. B. Beadles commenced his action against said defendants A. E. Smyser, Mayor, G. R. Byers, W. B. Brengle, A. C. Hinde, John Rather, Chas. Christoph, E. J. Miller, D. F. Marshall, J. H. Flood, City Councilmen, and W. R. Fry, City Treasurer of the City of Perry, Noble County, Oklahoma Territory, by filing in the District Court of Noble County, Oklahoma Territory, his petition which, with all the endorsements thereon is in words and figures as follows, to wit:

21 In the District Court of Noble County, Oklahoma Territory.

No. —.

J. B. BEADLES, Plaintiff,

vs.

A. E. SMYSER, Mayor; G. R. BYERS, W. B. BRENGLE, A. C. HINDE, HARRY SHORTMAN, CHAS. CHRISTOPH, E. J. MILLER, D. F. MARSHALL, J. H. FLOOD, City Councilmen, and W. R. FRY, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory, Defendants.

Petition in Mandamus.

Comes now the plaintiff, J. B. Beadles, in the above entitled cause, and for his cause of action against the defendant- A. E. Smyser, Mayor, G. R. Byers, W. B. Brengle, A. C. Hinde, Harry Shortman, Chas. Christoph, E. J. Miller, D. F. Marshall, J. H. Flood, City Councilmen, and W. R. Fry, City Treasurer, all of the City of Perry, Noble County, Oklahoma Territory, says:

That the City of Perry, in Noble County, Oklahoma Territory, is, and at all times hereinafter alleged has been, a city of the first class, duly organized and incorporated under the laws of the Territory of Oklahoma; that the said A. E. Smyser is Mayor, and the said G. R. Byers, W. B. Brengle, A. C. Hinde, Harry Shortman, Chas. Chris-

toph, E. J. Miller, D. F. Marshall, J. H. Flood are members of the City Council, and the said W. R. Fry is the City Treasurer of the said City of Perry.

Plaintiff further alleges that he is the holder and owner of certain outstanding and unpaid judgments against the said City of Perry, and which judgments have been duly rendered by courts of competent jurisdiction in actions pending and in each of which actions the City of Perry was a party and was duly served with process, and which said City of Perry duly appeared in each and all of said actions, and said judgments were duly and legally rendered and entered against the said City; that a list of said judgments, with the court in which they were rendered and the number of the
22 case, the plaintiff therein, the date of the rendition of said judgment, the principal thereof, and the amount with interest figured to the 1st day of February, 1906, also the judgments for costs rendered in said cause is, giving each judgment separately, as follows, to wit:

Judgments in Probate Court, Noble County, Oklahoma Territory.

Case.	Plaintiff.	Date.	Principal.	Amount.	Costs.
406	Burlingame (part)	M'ch 16, 1898	$74.00	$108.93	
435	J. F. Van Voorhis	M'ch 31, 1898	720.25	1058.91	$6.30
436	F. G. Moore	M'ch 31, 1898	791.63	1163.69	7.35
442	A. R. Museller (part)	M'ch 31, 1898	.....	1160.50	6.75
451	C. J. Tontz	Apr. 1, 1898	309.50	454.96	5.95
457	R. E. Wade	Apr. 18, 1898	204.40	299.91	4.50
462	L. T. Shockey	Apr. 25, 1898	181.50	266.07	4.05
484	J. B. Beadles	June 25, 1898	514.37	748.92	5.90
476	J. F. Van Voorhis	June 1, 1898	748.48	1092.78	5.65
516	Richards & Conover	Sept. 3, 1898	280.32	404.96	6.25
545	Perry Water, Light & Ice Co.	Apr. 16, 1898			
546	" " "	Dec. 24, 1898			
547	" " "	Dec. 24, 1898	.....	5704.64	25.40
548	" " "	Dec. 24, 1898			
567	W. E. Caldwell	Jan. 19, 1899	632.20	699.94	6.35
506	F. M. Richardson	M'ch 10, 1899	585.42	827.49	5.85
536	S. W. Washington	M'ch 30, 1898	64.00	94.09	2.50
638	W. M. Bowles	M'ch 28, 1898	53.00	77.04	1.95
540	Foster Lumber Co	June 1, 1898	61.18	91 69	2.45
23					
545	W. T. Smith	April 18, 1898	72.27	106.02	2.55
547	J. W. Quick	April 26, 1898	45.00	65.95	3.25
558	G. W. Durfee	May 19, 1898	74.56	109 01	2.35
577	J. E. Burch	June 29, 1898	39.83	58.05	2.35
597	Jennie Ludwig	Dec. 3, 1898	37.00	52.87	3.15
604	S. A. Aikens	Sept. 8, 1898	55.00	79.40	2.20
605	I. N. Cornelius	Sept. 24, 1898	65.30	94.11	1.90
668	Jno. A. Hansen	April 6, 1899	98.00	138.10	2.15
579	J. B. Beadles	April 25, 1899	95.50	134.27	2.30
504	E. E. Gibbons	Jan. 18, 1898	71.83	102.04	2.65
441	Jas. Lobsitz	M'ch 14, 1898	508.41	748.70	5.00

Judgments in J. P. Court of I. N. Cornelius of the City of Perry.

Case.	Plaintiff.	Date.	Principal.	Amount.	Costs.
	J. M. Breman	Sept 22, 1898	$24.00	$34.57	$3.65
	H. A. Smith	Jan. 8, 1898	20.35	28.97	3.45
	Total		.....	$16207.48	$134.05

and that the total amount of said judgments against the City of Perry so owned by this plaintiff, with the interest figured to Feb. 1, 1906, is the sum of $16,207.48, with an additional sum of $134.05 as costs in said judgments, making a total sum due on that date to the undersigned in judgments against the said City of Perry of $16,304.51.

This plaintiff further alleges that all of said judgments are owned and held by this plaintiff, and all of said judgments which were not rendered in the name of this plaintiff have been duly and legally assigned and transferred for value to this plaintiff in writing, and the plaintiff is the owner and holder thereof.

24 Plaintiff further alleges that all of said judgments are valid, subsisting and unpaid judgments against the said City of Perry, and have all been rendered upon the city warrants duly and regularly issued upon the general fund of the City of Perry for the payment of the valid, subsisting and outstanding obligations of said City of Perry, and that no funds had ever been provided by the City of Perry with which to pay said outstanding general warrants of the City of Perry when the said judgments were rendered. That there were also during about the year 1898 and prior to the rendition of the above and foregoing judgments, other judgments rendered against the City of Perry, and which judgments were prior in date and point of time to the above and foregoing judgments, and that the City of Perry paid off said other judgments in their order of rendition, and the judgments upon the judgment fund of the City of Perry were paid down to the aforementioned judgment of plaintiff of H. A. Smith, rendered January 8, 1898, of $20.35, and that all of the judgments rendered prior to that time have been duly paid by the City of Perry; that after the rendition of said judgments now so held by the plaintiff, and said other judgments, and on, about and prior to the 3rd day of December, 1901, the various judgment creditors of the said City of Perry, for a good consideration, to wit: the ultimate payment of their own judgments in the order of rendition, and in order that their judgments might be paid in their order of rendition, entered into and filed with the then City Treasurer of the City of Perry, one Joe Dolezal, their certain waiver, promise and agreement in writing, in the following words, to wit:

"I, the undersigned judgment creditor holding judgment against the City of Perry, Noble County, Oklahoma Territory, hereby ask that the City Treasurer pay all judgments against the City of Perry in order of rendition, hereby waiving right to payment pro rata,

if such right exists, and this waiver shall apply to all grantees and assigns. Said judgments are in amounts and dates as follows:"

25 Following the above writing, signed by each of the judgment creditors of the City of Perry, excepting a very small portion thereof not herein given, appeared the names of each of the judgment creditors of said City herein enumerated in the list of judgments above given, owned by this plaintiff, and that all the said judgment creditors representing the unpaid outstanding judgment indebtedness of the said City of Perry, in the sum of about $22,000.00, all of the owners of said judgments, made said waivers excepting the portion of the said judgment creditors representing unpaid outstanding judgments of about $4,000.00.

This plaintiff further alleges that said agreement and waivers were signed up and presented to the City Treasurer of the City of Perry along through the year 1901, and up to about the 3rd day of December, 1901, and that said plan of payment in order of rendition being satisfactory to the larger number of the judgment creditors of the City of Perry, was recognized by the said City of Perry and by the said Treasurer of said City of Perry, and the said plan of payment was followed in paying the judgments of the City of Perry prior to and subsequent to the 3rd day of December, 1901, and up to the early part of the year 1905, and all of the judgments prior to the above mentioned list of judgments held by this plaintiff were paid in that way.

And plaintiff further alleges that on the 3rd day of December, 1901, the said waivers so made and executed by the said judgment creditors of the City of Perry were presented to the City Council of the City of Perry then in session, and the said City Council considered, passed and adopted the following resolution with reference thereto:

26 "Whereas, the judgment creditors holding judgments against the City of Perry have practically all signed written waivers of the right, if such right exists, to payment of said judgments pro rata, and therein consent to the payment of said judgments in the order of their rendition against said City;

Therefore, Be it resolved that the City Treasurer is hereby authorized and directed to pay the said judgments existing against the City of Perry in the order of their rendition out of the funds now on hand and as they shall accrue in the judgment fund."

And the plaintiff alleges that the City Treasurer of said City of Perry, prior to Dec. 3, 1901, and subsequent thereto, followed the said plan of payment of said judgments agreed upon generally by and between the creditors of the said City of Perry, and the said City, and that this plaintiff was at the time of the adoption of said resolution the owner of most of the above list of judgments specified herein, and which he still owns against the City of Perry, and that he then and thereafter, and ever since has, and the other holders of the judgments hereinbefore listed and specified and now owned and held by this plaintiff, did also rely upon the said agreement existing between them and the City of Perry as to the payment of

said judgments so rendered against the City of Perry, and now held by this plaintiff. And this plaintiff did, and the prior holders of all of the above list of judgments did also, rely upon such agreement so made between the said judgment creditors and the City of Perry, that the said judgments should be paid in the order of their rendition, and have therefore not received any payment upon any of the above judgments which they would otherwise have received in their pro rata shares of the payment of the amounts annually paid into and disbursed from the judgment fund of the City of Perry.

27 This plaintiff further alleges that under the law of the Territory of Oklahoma as it has existed throughout the life of all of the above judgments and since the rendition thereof, it is provided that the judgment fund shall be and is created out of which judgments against municipalities, in this instance the City of Perry, shall be and are paid, and under the law, all judgment demands against the City of Perry must be paid by moneys raised by the levy of taxes and paid into and accruing in the said judgment fund, and said judgments can be paid in no other way, and the said judgments cannot be paid except by moneys which are raised by taxation and paid into the said judgment fund, and no judgment or any part thereof can be paid until the moneys therefor are so raised by taxation and paid into said fund; that while an execution under the laws of the Territory of Oklahoma may issue upon and therein may be collected all civil and ordinary judgments, there is no provision of law for the levy of an execution against a municipality, and under the law of said Territory, no execution, if issued against the City of Perry, could be or could have been, in the years intervening since and including 1898, levied upon any property of the City of Perry, for the City of Perry has all that time had no property whatever subject to levy of an execution, and under the law could neither acquire nor hold any property subject to execution, and the issuance of an execution for the collection of said judgments of plaintiff would have been useless; that the method and means provided by law for the payment of all judgments, including those of plaintiff hereinbefore listed, against the City of Perry has been during all the period of the existence of said judgments as aforesaid by the levy and collection of taxes into said judgment fund for the payment of said judgments, and said judgments could be paid in that method and that method only, but have not been paid by reason of

28 the fact that there have never been sufficient moneys in the said judgment fund of the City of Perry to pay all of said judgments, and no pro rata portion thereof has been paid by reason of the fact that the City of Perry entered into the above and foregoing agreement mentioned as of date Dec. 3, 1901, for the payment of all judgments against the said City of Perry in their order of rendition, and the moneys which have accrued from time to time in the judgment fund of the City of Perry have therefore been applied to judgments of prior date to those held by this plaintiff.

The plaintiff further alleges that it is and has been under the laws of the Territory of Oklahoma during the life of the above mentioned judgments, and at least since the year 1899, the duty of the

City of Perry to levy annually a tax of not to exceed five mills on the dollar upon all of the taxable property of the said City of Perry for the judgment fund, and out of which to pay said judgment against the City of Perry, and that the said City of Perry has recognized and met its said obligation by the levy of said annual tax of five mills on the dollar, to create a fund with which to pay said judgments, and that out of said fund the judgments of the said City of Perry were, as aforesaid, paid down to the early part of the year 1905, and that since said time the City Treasurer of the City of Perry has, under and by the wish, will and direction of the Mayor and City Council of said City of Perry, been declining to pay any of said judgments of this plaintiff, either in their order of rendition, or to pay the same pro rate among the said judgments, or to consider and pay the same pro rata with the other judgments of a similar character rendered and outstanding against the City of Perry, and that there has accumulated and is now in the hands of the defendant W. R. Fry, City Treasurer of the City of Perry, the sum of $2228.96 of money held in the judgment fund of the City of Perry for the payment of judgments against the said City, and which moneys have accrued in said fund in his hands and been realized
29 upon the said tax levies of five mills made annually for the judgment fund of the City of Perry, and which he holds for the purpose of paying off said judgments, and the said levies of five mills per annum have been made for the judgment fund of the City of Perry annually since the year 1899 by the Mayor and City Councilmen of the city of Perry, in recognition all the time of the validity of the above judgments and of their continuing in binding force as valid and subsisting judgments and outstanding debts of record against the City of Perry, and that under the law it is the duty of the City of Perry to make a levy of the tax as aforesaid annually, and not to exceed five mills on the dollar of the taxable property of the City of Perry, with which to pay said judgment debts, and that the said duty of levying taxes in the amount of five mills on the dollar of the taxable property of the City of Perry for the judgment fund has been fully met by said City of Perry down to and including the year 1905, and that the City of Perry did continue to recognize all of the above judgments of the plaintiff as valid and subsisting and outstanding judgments against the City of Perry down to the early part of the year 1905, and that the regular five mill levy for the judgment fund for the City of Perry was duly made by the Mayor and City Councilmen of the City of Perry for the year 1905; but notwithstanding such levy, and notwithstanding the fact that the said City Treasurer has in his hands a considerable fund in about the amount as hereinbefore stated in the judgment funds which could and should be applied as the law provides upon the payment of the outstanding judgments against the City of Perry, the said City of Perry and the said Mayor, Councilmen and City Treasurer of the City of Perry do each and all decline and refuse to obey the law in the premises, and decline and refuse to recognize the said judgments of this plaintiff as valid and subsisting judgments against

the City of Perry, and to apply the moneys as they come into
30 the hands of the Treasurer of the City of Perry to the liquidation of said judgments, but deny the validity of the said judgments so held by this plaintiff, on the sole ground that the same have become dormant and are barred by the statute of limitation, and that the defendants as the governing officers of the City of Perry, and as the municipal officers thereof, are threatening to continue to so disregard the rights of this plaintiff and to refuse to recognize the said judgments of the plaintiff as valid, subsisting and outstanding judgments against the City of Perry, and to provide for their payment in manner provided by law, and are threatening to apply the moneys as they accrue from time to time in the judgment fund of the City of Perry to the payment of other subsequent judgments against the City of Perry, to the total disregard of the aforesaid judgments of this plaintiff, and to pay out and distribute the moneys and funds accruing in said judgment fund of the City of Perry to the payment of other judgments, and that this plaintiff is entitled under the law to have his said judgments considered as valid and subsisting judgments against the City of Perry, and to have the moneys which accrue in said fund either paid out upon said judgments in their order of rendition under the said contract between the judgment creditors of the City of Perry and the said City, or to have the same paid pro rata upon the plaintiff's said judgments, considered together with the other judgments of the City of Perry, both and all of which the said defendants refuse to do.

Plaintiff further alleges that under the laws of the Territory of Oklahoma said judgments have not and cannot become dormant, and the statute of limitation cannot apply thereto until money is provided in the judgment fund of the said City of Perry with
31 which to pay the said judgment debts against the City of Perry, and that plaintiff's only remedy to collect said judgments is by recourse to the judgment fund of the City of Perry; that the City of Perry has annually levied, as aforesaid, the full amount of five mills, as provided by law, the maximum levy for the said judgment fund, and therefore the plaintiff and the prior holders of said judgments now held by plaintiff could not have resorted to mandamus, their only remedy to compel the levy of a tax to pay said judgments, and the City of Perry has met said obligation of making such levy by voluntarily levying the full tax provided by law for the judgment fund, and out of which judgments against the City of Perry could be paid; that if the said City of Perry and its said officers are allowed to disregard the law in the premises and to thus repudiate the said judgments so held by this plaintiff, and to decline to recognize the same as valid judgments against the City of Perry, and to pay out the tax money accruing from the said annual levies of five mills so made for the payment of judgments against the City of Perry, and to apply said moneys to the payment of subsequent judgments held by other persons than this plaintiff against the City of Perry, the plaintiff's said judgments will be entirely lost and will be entirely worthless; and the entire amount of said — more than $16,000 will be lost to this plaintiff; that the plain-

tiff has no adequate remedy at law, and mandamus is the only remedy by which he can compel the performance of the duty asked to be performed herein on the part of the said defendants, the Mayor, Councilmen and City Treasurer of the said City of Perry.

Plaintiff further alleges that he has presented to the defendants, the Mayor, City Councilmen and City Treasurer above named of the City of Perry, a full, true and correct list of his said judgments, and has demanded that the said Mayor, City Councilmen and City Treasurer of the City of Perry shall recognize the said out-
32 standing judgments against the City of Perry as valid, subsisting judgments of the City of Perry, Noble County, Oklahoma Territory, in full force and effect, and as subsisting and valid judgments against the said judgment fund of the City of Perry, and in their proper order, and that they shall continue to make the full five mill levy for the judgment fund of the City of Perry for the payment of said judgments, together with the other outstanding judgments of the City of Perry as the law provides, and that they shall pay out upon said judgments in their proper order and as the law provides the money now in their hands in the judgment fund of the City of Perry, and the moneys which shall from time to time come into their hands upon and for the judgment fund of the City of Perry, and apply the same in the proper order and proper proportions upon and to the payment of the said judgments; and that they, the said Mayor, City Councilmen and City Treasurer of the City of Perry, and each of them, shall do all things requisite and necessary for and toward the recognition of said judgments as valid and subsisting judgments against the judgment fund of the City of Perry, and toward the levying and collection of taxes therefor and the application of the same to the payment of said judgments, all in manner and form as required by law. That said demand was duly presented in writing to the Mayor and Councilmen of the City of Perry in regular session, and also said demand was by the plaintiff duly presented in writing to the said W. R. Fry, City Treasurer of the City of Perry, all of which the said Mayor, City Councilmen and the City Treasurer of the City of Perry did refuse.

Wherefore, The plaintiff prays that a writ of mandamus issue against the said defendants, A. E. Smyser, as Mayor of the City of Perry, G. R. Byers, W. B. Brengle, A. C. Hinde, Harry Shortman, Chas. Christoph, E. J. Miller, D. F. Marshall and J. H. Flood, Councilmen of the City of Perry, and W. R. Fry, City Treasurer of the City of Perry, directing and commanding them and each
33 of them to recognize the said outstanding judgments of the plaintiff against the City of Perry as valid and subsisting judgments of the City of Perry in full force and effect as subsisting and valid judgments against the judgment fund of the City of Perry in their proper order, and that they shall continue to make the full five mill levy for the judgment fund of the said City of Perry for the payment of said judgments, together with the other outstanding judgments of the City of Perry, as the law provides, and that each of said parties shall perform the duty enjoined upon them by law as Mayor, City Councilmen and City Treasurer of the City of Perry

to pay out upon the judgments of plaintiff in their proper order, as the law provides, the moneys now in their hands and in the hands of the said Treasurer of the City of Perry and in the judgment fund of said City and the moneys which shall from time to time come into the hands of said City and of said City treasurer upon and for the judgment fund of the said City of Perry, and apply the same in their proper order and proper proportion upon and to the payment of the said judgments, and that each of said defendants do all that is requisite and necessary for and toward the recognition of said judgments as valid and subsisting judgments against the judgment fund of the City of Perry, and toward the levying and collecting of the taxes therefor and the application of moneys derived therefrom to the payment of said judgments, all in the manner and form as required by law, and that the plaintiff recover his costs herein, and all other relief that is meet and equitable in the premises.

S. H. HARRIS AND
DALE & BIERER,
Attorneys for Plaintiff.

34 TERRITORY OF OKLAHOMA, *Logan County, ss:*

J. B. Beadles, being first duly sworn, deposes and says that he is the plaintiff in the cause of action set out in the above and foregoing petition; that he has read and knows the contents of the said petition, and that the allegations contained in same are true.

J. B. BEADLES.

Subscribed and sworn to before me this 10 day of March, 1906.

MARIE E. TERRELL,
[SEAL.] *Notary Public.*

My commission expires Nov. 18, 1908.

Endorsed on back: No. 2261.—In the District Court of Noble County, Oklahoma Territory.—J. B. Beadles, plaintiff, *vs.* A. E. Smyser, Mayor, G. R. Byers, W. B. Brengle, A. C. Hinde, John Rather, Chas. Christoph, E. J. Miller, D. F. Marshall, J. H. Flood, City Councilmen, and W. R. Fry, City Treasurer of the City of Perry, Noble County, Oklahoma Territory, defendants.—Petition in Mandamus.—Filed March 12, 1906, Charles L. Watson, Clerk, By W. S. Lamb, Deputy.—S. H. Harris and Dale & Bierer, Attorneys for plaintiff.

35 Said petition was on the date of its filing, March 12, 1906, duly presented to the Hon. Bayard T. Hainer, Judge of the District Court of Noble County, Oklahoma Territory, and upon presentation of the same, said Judge duly awarded and allowed an alternative writ of mandamus thereon, which writ of mandamus is in words and figures, with all the endorsements thereon, as follows, to wit:

36 In the District Court of Noble County, Oklahoma Territory.

No. —.

J. B. BEADLES, Plaintiff,

vs.

A. E. SMYSER, Mayor; G. R. BYERS, W. B. BRENGLE, A. C. HINDE, HARRY SHORTMAN, CHAS. CHRISTOPH, E. J. MILLER, D. F. MARSHALL, J. H. FLOOD, City Councilmen, and W. R. FRY, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory, Defendants.

Alternative Writ of Mandamus.

The Territory of Oklahoma to A. E. Smyser, Mayor, G. R. Byers, W. B. Brengle, A. C. Hinde, Harry Shortman, Chas. Christoph, E. J. Miller, D. F. Marshall, J. H. Flood, City Councilmen, and W. R. Fry, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory:

Whereas, J. B. Beadles, plaintiff in the above entitled cause, has filed in the District Court of Noble County, Oklahoma Territory, his sworn petition alleging:

That the City of Perry, in Noble County, Oklahoma Territory, is, and at all times hereinafter alleged has been, a city of the first class, duly organized and incorporated under the laws of the Territory of Oklahoma; that the said A. E. Smyser is Mayor and the said G. R. Byers, W. B. Brengle, A. C. Hinde, Harry Shortman, Chas. Christoph, E. J. Miller, D. F. Marshall, J. H. Flood are members of the City Council, and the said W. R. Fry is the City Treasurer of the said City of Perry.

Plaintiff further alleges that he is the holder and owner of certain outstanding and unpaid judgments against the said City of Perry, and which judgments have been duly rendered by courts of competent jurisdiction in actions pending and in each of which actions the City of Perry was a party and was duly served with process, and which said City of Perry duly appeared in each and all of said actions, and said judgments were duly and legally rendered and entered against the said City; that a list of said judgments,

37 with the court in which they were rendered and the number of the case, the plaintiff therein, the date of the rendition of said judgment, the principal thereof, and the amount with interest figured to the 1st day of February, 1906, also the judgments for costs rendered in said cause, is giving each judgment separately, as follows, to wit:

Judgments in Probate Court, Noble County, Oklahoma Territory.

Case.	Plaintiff.	Date.	Principal.	Amount.	Costs.
406	Burlingame (part)	M'ch 16, 1898	$74.00	$108.93	
435	J. F. Van Voorhis	M'ch 31, 1898	720.25	1058.91	$6.30
436	F. G. Moore	M'ch 31, 1898	791.63	1163.69	7.35
442	A. R. Museller (part)	M'ch 31, 1898	.....	1160.50	6.75
451	C. J. Tontz	Apr. 1, 1898	309.50	454.96	5.95
457	R. E. Wade	Apr. 18, 1898	204 40	299.91	4.50
462	L. T. Shockey	Apr. 25, 1898	181.50	266.07	4.05
484	J. B. Beadles	June 25, 1898	514.37	748.92	5.90
476	J. F. Van Voorhis	June 1, 1898	748.48	1092.78	5.65
516	Richards & Conover	Sept. 3, 1898	280.32	404.96	6.25
545	Perry Water, Light & Ice Co.	Apr. 16, 1898			
546	" " "	Dec. 24, 1898			
547	" " "	Dec. 24, 1898	.....	5704.64	25.40
548	" " "	Dec. 24, 1898			
567	W. E. Caldwell	Jan. 19, 1899	632.20	699.94	6.35
506	F. M. Richardson	M'ch 10, 1899	585.42	827.49	5.85
536	S. W. Washington	M'ch 30, 1898	64.00	94.09	2.50
638	W. M. Bowles	M'ch 28, 1898	53.00	77.04	1.95
540	Foster Lumber Co	June 1, 1898	61.18	91 69	2.45
545	W. T. Smith	Apr. 18, 1898	72.27	106.02	2.55
547	J. W. Quick	Apr. 26, 1898	45.00	65.95	3.25
38					
558	G. W. Durfee	May 19, 1898	74.56	109.01	2.35
577	J. E. Burch	June 29, 1898	39.83	58.05	2.35
597	Jennie Ludwig	Dec. 3, 1898	37.00	52.87	3.15
604	S. A. Aikens	Sept. 8, 1898	55.00	79.40	2.20
605	I. N. Cornelius	Sept. 24, 1898	65.30	94.11	1.90
668	Jno. A. Hansen	Apr. 6, 1899	98.00	138.10	2.15
579	J. B. Beadles	Apr. 25, 1899	95.50	134.27	2.30
504	E. E. Gibbons	Jan. 18, 1898	71.83	102.04	2.65
441	Jas. Lobsitz	M'ch 14, 1898	508.41	748.70	5.00

Judgments in J. P. Court of I. N. Cornelius, of the City of Perry.

J. M. Breman	Sept. 22, 1898	$24.00	$34.57	$3.65
H. A. Smith	Jan. 8, 1898	20.35	28.97	3.45
Total	.....	.....	$16207.48	$134.05

and that the total amount of said judgments against the City of Perry so owned by this plaintiff, with the interest figured to Feb. 1, 1906, is the sum of $16,207.48, with an additional sum of $134.05 as costs in said judgments, making a total sum due on that date to the undersigned in judgments against the said city of Perry of $16,304.51.

This plaintiff further alleges that all of said judgments are owned and held by this plaintiff, and all of said judgments which were not rendered in the name of this plaintiff have been duly and legally assigned and transferred for value to this plaintiff in writing, and the plaintiff is the owner and holder thereof.

Plaintiff further alleges that all of said judgments are valid, subsisting and unpaid judgments against the said City of Perry, and

have all been rendered upon the city warrants duly and regularly issued upon the general fund of the City of Perry for the
39 payment of the valid, subsisting and outstanding obligations of said City of Perry, and that no funds had ever been provided by the City of Perry with which to pay said outstanding general warrants of the City of Perry when the said judgments were rendered. That there were also during about the year 1898 and prior to the rendition of the above and foregoing judgments, other judgments rendered against the City of Perry, and which judgments were prior in date and point of time to the above and foregoing judgments, and that the City of Perry paid off said other judgments in their order of rendition, and the judgments upon the judgment fund of the City of Perry were paid down to the aforementioned judgment of plaintiff of H. A. Smith, rendered January 8, 1898, of $20.35, and that all of the judgments rendered prior to that time have been duly paid by the City of Perry; that after the rendition of said judgments now so held by the plaintiff, and said other judgments, and on, about and prior to the 3rd day of December, 1901, the various judgment creditors of the said City of Perry, for a good consideration, to wit: the ultimate payment of their own judgments in the order of rendition, and in order that their judgments might be paid in their order of rendition, entered into and filed with the then City Treasurer of the City of Perry, one Joe Dolezal, their certain waiver, promise and agreement in writing, in the following words, to wit:

"I, the undersigned judgment creditor holding judgment against the City of Perry, Noble County, Oklahoma Territory, hereby ask that the City Treasurer pay all judgments against the City of Perry in order of rendition, hereby waiving right to payment pro rata, if such right exists, and this waiver shall apply to all grantees and assigns. Said judgments are in amounts and dates as follows:"

Following the above writing, signed by each of the judgment creditors of the City of Perry, excepting a very small portion thereof not herein given, appeared the names of each of the judg-
40 ment creditors of said city herein enumerated in the list of judgments above given, owned by this plaintiff, and that all the said judgment creditors representing the unpaid outstanding judgment indebtedness of the said City of Perry, in the sum of about $22,000.00, all of the owners of said judgments, made said waivers excepting the portion of the said judgment creditors representing unpaid outstanding judgments of about $4,000.00.

The plaintiff further alleges that said agreement and waivers were signed up and presented to the City Treasurer of the City of Perry along through the year 1901, and up to about the 3rd day of December, 1901, and that said plan of payment in order of rendition being satisfactory to the larger number of the judgment creditors of the City of Perry, was recognized by the said City of Perry and by the said Treasurer of said City of Perry, and the said plan of payment was followed in paying the judgments of the City of Perry prior to and subsequent to the 3rd day of December, 1901, and up to the early part of the year 1905, and all of the judgments prior to

the above mentioned list of judgments held by this plaintiff were paid in that way.

And plaintiff further alleges that on the 3rd day of December, 1901, the said waivers so made and executed by the said judgment creditors of the City of Perry were presented to the City Council of the City of Perry then in session, and the said City Council considered, passed and adopted the following resolution with reference thereto:

"Whereas, the judgment creditors holding judgments against the City of Perry have practically all signed written waivers of the right if such right exists, to payment of said judgments pro rata, and therein consent to the payment of said judgments in the order of their rendition against said City;

41 Therefore, be it resolved that the City Treasurer is hereby authorized and directed to pay the said judgments existing against the City of Perry in the order of their rendition out of the funds now on hand and as they shall accrue in the judgment funds."

And the plaintiff alleges that the City Treasurer of said City of Perry, prior to Dec. 3, 1901, and subsequent thereto, followed the said plan of payment of said judgments agreed upon generally by and between the creditors of the said City of Perry, and the said City, and that this plaintiff was at the time of the adoption of said resolution the owner of most of the above list of judgments specified herein, and which he still owns against the City of Perry, and that he then and thereafter, and ever since has, and the other holders of the judgments hereinbefore listed and specified and now owned and held by this plaintiff, did also rely upon the said agreement existing between them and the City of Perry as to the payment of said judgments so rendered against the City of Perry, and now held by this plaintiff. And this plaintiff did, and the prior holders of all of the above list of judgments did also, rely upon such agreement so made between the said judgment creditors and the City of Perry, that the said judgments should be paid in the order of their rendition, and have therefore not received any payment upon any of the above judgments which they would otherwise have received in their pro rata shares of the payment of the amounts annually paid into and disbursed from the judgment fund of the City of Perry.

This plaintiff further alleges that under the law of the Territory of Oklahoma as it has existed throughout the life of all of the above judgments and since the rendition thereof, it is provided that the judgment fund shall be and is created out of which judgments against municipalities, in this instance the City of Perry, shall be and are paid, and under the law, all judgment demands

42 against the City of Perry must be paid by moneys raised by the levy of taxes and paid into and accruing in the said judgment fund, and said judgments can be paid in no other way, and the said judgments cannot be paid except by moneys which are raised by taxation and paid into the said judgment fund, and no judgment or any part thereof can be paid until the moneys therefor are so raised by taxation and paid into said fund; that while an execution under the laws of the Territory of Oklahoma may issue upon and

therein may be collected all civil and ordinary judgments, there is no provision of law for the levy of an execution against a municipality, and under the law of said Territory, no execution, if issued against the City of Perry, could be or could have been, in the years intervening since and including 1898, levied upon any property of the City of Perry, for the City of Perry has all that time had no property whatever subject to levy of an execution, and under the law could neither acquire nor hold any property subject to execution, and the issuance of an execution for the collection of said judgments of plaintiff would have been useless; that the method and means provided by law for the payment of all judgments, including those of plaintiff hereinbefore listed, against the City of Perry has been during all the period of the existence of said judgments as aforesaid, by the levy and collection of taxes into said judgment fund for the payment of said judgments, and said judgments could be paid in that method and that method only, but have not been paid by reason of the fact that there have never been sufficient moneys in the said judgment fund of the City of Perry to pay all of said judgments, and no pro rata portion thereof has been paid by reason of the fact that the City of Perry entered into the above and foregoing agreement mentioned as of date Dec. 3, 1901, for the payment of all judgments against the said City of Perry in their order of rendition, and the moneys which have accrued from time to time in the
43 judgment fund of the City of Perry have therefore been applied to judgments of prior date to those held by this plaintiff.

The plaintiff further alleges that it is and has been, under the laws of the Territory of Oklahoma during the life of the above mentioned judgments, and at least since the year 1899, the duty of the City of Perry to levy annually a tax of not to exceed five mills on the dollar upon all of the taxable property of the said City of Perry for the judgment fund, and out of which to pay said judgments against the City of Perry, and that the said City of Perry has recognized and met its said obligation by the levy of said annual tax of five mills on the dollar, to create a fund with which to pay said judgments, and that out of said fund the judgments of the said City of Perry were, as aforesaid, paid down to the early part of the year 1905, and that since said time the City Treasurer of the City of Perry, has under and by the wish, will and direction of the Mayor and City Council of said City of Perry, been declining to pay any of said judgments of this plaintiff, either in their order of rendition, or to pay the same pro rata among the said judgments, or to consider and pay the same pro rata with the other judgments of a similar character rendered and outstanding against the City of Perry, and that there has accumulated and is now in the hands of the defendant W. R. Fry, City Treasurer of the City of Perry, the sum of $2228.96 of money held in the judgment fund of the City of Perry for the payment of judgments against the said City, and which moneys have accrued in said fund in his hands and been realized upon the said tax levies of five mills made annually for the judgment fund of the City of Perry, and which he holds for the purpose of pay-

ing off said judgments, and the said levies of five mills per annum have been made for the judgment fund of the City of Perry annually since the year 1899 by the Mayor and City Councilmen of the City of Perry, in recognition all the time of the validity of
44 the above judgments and of their continuing in binding force as valid and subsisting judgments and outstanding debts of record against the City of Perry, and that under the law it is the duty of the City of Perry to make a levy of the tax as aforesaid annually, and not to exceed five mills on the dollar of the taxable property of the City of Perry, with which to pay said judgment debts, and that the said duty of levying taxes in the amount of five mills on the dollar of the taxable property of the City of Perry for the judgment fund has been fully met by said City of Perry down to and including the year 1905, and that the City of Perry did continue to recognize all of the above judgments of the plaintiff as valid and subsisting and outstanding judgments against the City of Perry down to the early part of the year 1905, and that the regular five mill levy for the judgment fund for the City of Perry was duly made by the Mayor and City Councilmen of the City of Perry for the year 1905; but notwithstanding such levy, and notwithstanding the fact that the said City Treasurer has in his hands a considerable fund in about the amount as hereinbefore stated in the judgment funds which could and should be applied as the law provides upon the payment of the outstanding judgments against the City of Perry, the said City of Perry and the said Mayor, Councilmen, and City Treasurer of the City of Perry do each and all declare and refuse to obey the law in the premises, and decline and refuse to recognize the said judgments of this plaintiff as valid and subsisting judgments against the City of Perry, and to apply the money as they come into the hands of the Treasurer of the City of Perry to the liquidation of said judgments, but deny the validity of the said judgments so held by this plaintiff, on the sole ground that the same have become dormant and are barred by the statute of limitation, and that the defendants as the governing officers of the City of Perry, and as the municipal officers thereof, are
45 threatening to continue to so disregard the rights of this plaintiff and to refuse to recognize the said judgments of the plaintiff as valid, subsisting and outstanding judgments against the City of Perry, and to provide for their payment in manner provided by law, and are threatening to apply the moneys, as they accrue from time to time in the judgment fund of the City of Perry to the payment of other subsequent judgments against the City of Perry, to the total disregard of the aforesaid judgments of this plaintiff, and to pay out and distribute the moneys and funds accruing in said judgment fund of the City of Perry to the payment of other judgments, and that this plaintiff is entitled under the law to have his said judgments considered as valid and subsisting judgments against the City of Perry, and to have the moneys which accrue in said fund either paid out upon said judgments in their order of rendition under the said contract between the judgment creditors of the City of Perry and the said City, or to have the same paid

pro rata upon the plaintiff's said judgments, considered together with the other judgments of the City of Perry, both and all of which the said defendants refuse to do.

Plaintiff further alleges that under the laws of the Territory of Oklahoma said judgments have not and cannot become dormant, and the statute of limitation cannot apply thereto until money is provided in the judgment fund of the said City of Perry with which to pay the said judgment debts against the City of Perry, and that plaintiff's only remedy to collect said judgments is by recourse to the judgment fund of the City of Perry; that the City of Perry has annually levied, as aforesaid, the full amount of five mills, as provided by law, the maximum levy for the said judgment fund, and therefore the plaintiff and the prior holders of said judgments now held by plaintiff could not have resorted to mandamus, their only remedy to compel the levy of a tax to pay said judgments, and the City of Perry has met said obligation of making such levy
46 by voluntarily levying the full tax provided by law for the judgment fund, and out of which judgments against the City of Perry could be paid; that if the said City of Perry and its said officers are allowed to disregard the law in the premises and to thus repudiate the said judgments so held by this plaintiff, and to decline to recognize the same as valid judgments against the City of Perry, and to pay out the tax money accruing from the said annual levies of five mills so made for the payment of judgments against the City of Perry, and to apply said moneys to the payment of subsequent judgments held by other persons than this plaintiff against the City of Perry, the plaintiff's said judgments will be entirely lost and will be entirely worthless; and the entire amount of said more than $16,000.00 will be lost to this plaintiff; that the plaintiff has no adequate remedy at law, and mandamus is the only remedy by which he can compel the performance of the duty asked to be performed herein on the part of the said defendants, the Mayor, Councilmen and City Treasurer of the said City of Perry.

Plaintiff further alleges that he has presented to the defendants, the Mayor, City Councilmen and City Treasurer above named of the City of Perry a full, true and correct list of his said judgments, and has demanded that the said Mayor, City Councilmen and City Treasurer of the City of Perry shall recognize the said outstanding judgments against the City of Perry as valid, subsisting judgments of the City of Perry, Noble County, Oklahoma Territory, in full force and effect, and as subsisting and valid judgments against the said judgment fund of the City of Perry, and in their proper order, and that they shall continue to make the full five mill levy for the judgment fund of the City of Perry for the payment of said judgments, together with the other outstanding judgments of the City of Perry as the law provides, and that they shall pay out upon said judgments in their proper order and as the law provides the
47 money now in their hands in the judgment fund of the City of Perry, and the moneys which shall from time to time come into their hands upon and for the judgment fund of the City of Perry, and apply the same in the proper order and proper proportions

upon and to the payment of the said judgments; and that they, the said Mayor, City Councilmen and City Treasurer of the City of Perry, and each of them, shall do all things requisite and necessary for and toward the recognition of said judgments as valid and subsisting judgments against the judgment fund of the City of Perry, and toward the levying and collection of taxes therefor and the application of the same to the payment of said judgments, all in manner and form as required by law. That said demand was duly presented in writing to the Mayor and Councilmen of the City of Perry in regular session, and also said demand was by the plaintiff duly presented in writing to the said W. R. Fry, City Treasurer of the City of Perry, all of which the said Mayor, City Councilmen and the City Treasurer of the City of Perry did refuse.

Whereas, the plaintiff upon the facts stated in said verified petition, prays that an alternative writ of mandate be issued, commanding you, the said A. E. Smysers, Mayor, R. G. Byers, W. B. Brengle, A. C. Hinde, Harry Shortman, Chas. Christoph, E. J. Miller, D. F. Marshall, J. H. Flood, City Councilmen, and W. R. Fry, City Treasurer of the City of Perry, Noble County, Oklahoma Territory, and each of you to recognize the said outstanding judgments of the plaintiff against the City of Perry as valid and subsisting judgments against the City of Perry, in full force and effect as subsisting and valid judgments against the judgment fund of the City of Perry in their proper order, and that you shall continue to make the full five mill levy for the judgment fund against the City of Perry for the payment of said judgments, together with the other outstand-
48 ing judgments of the City of Perry, as the law provides, and that each of you shall perform the duty enjoined upon you by law as Mayor, City Councilmen and City Treasurer of the City of Perry, to pay out upon the judgments of plaintiff in their proper order, as the law provides, the moneys now in their hands and in the hands of the said W. R. Fry, City Treasurer of the City of Perry, and in the judgment fund of said City, and the moneys which shall from time to time come into the hands of the said City and of the said City Treasurer upon and for the judgment fund of the said City of Perry, and shall apply the same in their proper order and proper proportion upon and to the payment of the said judgments, and that each of you said defendants do all that is requisite and necessary for and toward the recognition of said judgments as valid and subsisting judgments against the judgment fund of the City of Perry, and toward the levying and collecting of the taxes therefor and the application of moneys derived therefrom to the payment of said judgments, all in manner and form as required by law, or show cause why the same should not be done.

Now, Therefore, You are hereby commanded to do toward and for the plaintiff all of the things above recited, for which the plaintiff prays a writ of mandamus shall issue, or in default thereof that you appear before the District Court of Noble County, Oklahoma Territory at its court room in the City of Perry, Noble County, Oklahoma Territory, at 9 o'clock A. M. on the 17 day of March, 1906, to show cause, if any you have, why the same should not be done, and then

and there abide the further order and judgment of the court, and that you have then and there this writ.

This Alternative Writ of Mandamus is issued by the undersigned Judge of the District Court of Noble County, Oklahoma Territory, this 12th day of March, 1906.

BAYARD T. HAINER,
Judge of the District Court of Noble County, Oklahoma Territory.

49 Endorsed on back: No. 2261—In the District Court of Noble County, Oklahoma Territory—J. B. Beadles, plaintiff, *vs.* A. E. Smyser, Mayor, G. R. Byers, W. B. Brengle, A. C. Hinde, Harry Shortman, Chas. Christoph, E. J. Miller, D. R. Marshall, J. H. Flood, City Councilmen, and W. R. Fry, City Treasurer, Noble County, Oklahoma Territory, defendants—Writ—Alternative Writ of Mandamus Allowed—Bayard T. Hainer, Judge of the District Court, Noble County, O. T.—Filed March 26, 1906—Chas. L. Watson, Clerk, by W. S. Lamb, Deputy.

50 Said writ of mandamus was duly served upon all of the defendants therein named, and said defendants did by their attorney, A. N. Whiteside, on the 16th day of March, 1906, file with the Clerk of the District Court of Noble County, Oklahoma Territory, in said cause, their motion for extension of time wherein to show cause, if any they had, why the acts mentioned in said writ should not be done. Said motion so duly filed is, with all the endorsements thereon, in words, and figures as follows, to wit:

51 In the District Court of Noble County, Oklahoma Territory.

J. B. BEADLES, Plaintiff,
vs.
A. E. SMYSER, Mayor; G. R. BYERS, W. B. BRENGLE, A. C. HINDE, HARRY SHORTMAN, CHAS. CHRISTOPH, E. J. MILLER, D. F. MARSHALL, J. H. FLOOD, City Councilmen, and W. R. FRY, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory, Defendants.

Motion for Extension of Time.

Whereas, notice of an Alternative Writ of Mandamus has been served upon the above named defendants, wherein said defendants were commanded to do toward and for the said plaintiff all the things recited in said Writ, in which the plaintiff prays a Writ of Mandamus shall issue, or in default thereof that said defendants must appear before the said District Court of Noble County at its Court room in the city of Perry, Noble County, Oklahoma Territory, at 9 o'clock A. M. on the 17th day of March, 1906, to show cause if any they have, why the acts mentioned in said Writ should not be done and to then and there abide the further order and judgment of said Court, and that they have then and there said Writ.

And whereas, it appearing to the defendants that all the facts and defenses necessary in the defendant's answer should be fully set up, and among some of the defenses to said action defendants desire to plead that the plaintiff in said action is not the legal or equitable owner of all the judgments mentioned in said Alternative Writ of Mandamus, and which fact, if properly pleaded, would require more time and preparation than has been given defendants by the notice hereinbefore referred to.

52 Therefore said defendants respectively ask the Honorable Court to grant the said defendants an extension of time to answer said Alternative Writ of Mandamus and to fix some future date as he may deem sufficient for the defendants to answer in said cause.

A. N. WHITESIDE,
Attorneys for Defendants.

Endorsed on back: 2261—J. B. Beadles *vs.* A. E. Smyser, Mayor, Geo. R. Beyers *et al.*, Councilmen, and W. R. Fry, City Treas. of the City of Perry, Noble Co., Oklahoma—Motion for extension of time to answer—Filed March 16, 1906, Charles L. Watson, Clerk—A. N. Whiteside, for defendants.

Said motion was on the 17th day of March, 1906, duly presented to the District Court of Noble County, Oklahoma Territory, and upon consideration thereof the court continued said cause and extended the time for the defendants to file their answer therein, and for hearing upon said cause to April 2, 1906.

53 And thereafter and on the 26th day of March, 1906, the defendants filed their answer and return to the writ of mandamus issued therein, which answer and return are, with all the endorsements thereof, in words and figures as follows, to wit:

In the District Court of Noble County, Oklahoma Territory.

J. B. BEADLES, Plaintiff,
vs.
A. E. SMYSER, Mayor; G. R. BYERS, W. B. BRENGLE, A. C. HINDE, HARRY SHORTMAN, CHAS. CHRISTOPH, E. J. MILLER, D. F. MARSHALL, J. H. FLOOD, City Councilmen, and W. R. FRY, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory, Defendants.

Answer.

Come now the defendants above named and each of them and for return to the alternative writ of mandamus issued herein, on the 12th day of March, 1906, state:

That each and all the judgments set out in said alternative writ of mandamus have become dormant, through and by the fault and neglect of said plaintiff. That no execution has ever been issued

on any of said judgments and that no proceeding was ever had by which any of said judgments have been revived, and hence this action of plaintiff is barred by the statute of limitations.

Respectfully submitted,

A. N. WHITESIDE,
Attorney for Defendants.

Endorsed on back: No. 2261.—J. B. Beadles *vs.* A. E. Smyser, Mayor, G. R. Byers *et al.*, and W. R. Fry, City Treas.—Answer.—Filed March 26, 1906.—Chas. L. Watson, Clerk, by W. S. Lamb, Deputy.—A. N. Whiteside, for defendants.

54 Thereafter and on the 2nd day of April, 1906, the defendants upon leave of court first had and obtained, filed their amended answer and return to the alternative writ of mandamus herein, which answer and return are, with all the endorsements thereon, in words and figures, as follows, to wit:

In the District Court of Noble County, Oklahoma Territory.

J. B. BEADLES, Plaintiff,
vs.
A. E. SMYSER, Mayor; G. R. BYERS, W. B. BRENGLE, A. C. HINDE, HARRY SHORTMAN, CHAS. CHRISTOPH, E. J. MILLER, D. F. MARSHALL, and J. H. FLOOD, City Councilmen, and W. R. FRY, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory, Defendants.

Amended Answer.

Come now the defendants and each of them, having first obtained leave of the Court to amend their answer herein, and in answer to the Alternative Writ of mandamus issued herein on the 12th day of March, 1906, state:

That each and all of the judgments set out in the said Alternative Writ of Mandamus have become dormant, through and by the fault and neglect of said plaintiff, as shown by said Alternative Writ of Mandamus; that no execution was ever issued on any of said judgments before said judgments became dormant and that no proceeding was ever had or begun by which any of said judgments have been revived, and therefore this action of plaintiff is barred by the statute of limitations.

Wherefore said defendants pray that the peremptory writ of mandamus prayed for by plaintiff be denied and that plaintiff pay the costs of this action.

A. N. WHITESIDE,
Attorney for Defendants.

Endorsed on back: 2261.—J. B. Beadles, *vs.* A. E. Smyser *et al.*—Amended Answer.—Filed Apr. 2, 1906, Chas. L. Watson, Clerk, by W. S. Lamb, Deputy. A. N. Whiteside, for defendants.

55 And thereafter and on the 2nd day of April, 1906, the plaintiff filed his motion for a judgment in his favor and for the issuance of a peremptory writ of mandamus on the pleadings therein, which motion is, with all the endorsements thereon, in words and figures as follows, to wit:

In the District Court of Noble County, Oklahoma Territory.

J. B. BEADLES, Plaintiff,
vs.
A. E. SMYSER ET AL., Defendants.

Motion.

Now comes the plaintiff upon the filing of the amended answer and return of the defendants and moves the court for judgment in his favor and the issuances of the peremptory writ of mandamus, on the ground that the amended answer fails to state any legal reason why said peremptory writ should not be issued.

DALE & BIERER,
S. H. HARRIS,
Attorneys for Plaintiff.

Endorsed on back: 2261.—Beadles *vs.* Smyser *et al.*—Motion for judgment on pleadings—Filed Apr. 2, 1906—Chas. L. Watson, Clerk, by W. S. Lamb, Deputy.

56 And thereafter and on the 2nd day of April, 1906, the defendants filed their motion for judgment on the pleadings in said cause, which motion is, with all the endorsements thereon, in words and figures as follows, to wit:

In the District Court of Noble County, Oklahoma Territory.

J. B. BEADLES, Plaintiff,
vs.
A. E. SMYSER, Mayor; G. R. BYERS, W. B. BRENGLE, A. C. HINDE, HARRY SHORTMAN, CHAS. CHRISTOPH, E. J. MILLER, D. F. MARSHALL, J. H. FLOOD, City Councilmen, and W. R. FRY, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory, Defendants.

Motion for Judgment.

Come now the defendants and move the court for judgment on the pleadings in the above entitled cause for the reason, that as shown in the alternative writ of mandamus heretofore issued, that all the judgments set out therein are barred by the statute of limitations, all of which is fully set out in defendants' answer and therefore the

peremptory writ of mandamus prayed for by plaintiff should be denied.

A. N. WHITESIDE,
Attorney for Defendants.

Endorsed on back: 2261.—In the Dist. Court of Noble Co. Oklahoma.—J. B. Beadles *vs.* A. E. Smyser *et al.*—Motion for judgment.—Filed April 2, 1906, Chas. L. Watson, Clerk, by W. S. Lamb, Deputy.—A. N. Whiteside, for defendants.

57 And thereafter and on the 2nd day of April, 1906, said cause came on for hearing before the District Court of Noble County, Oklahoma Territory, and at said hearing the Court granted the defendants leave to file their amended return to the alternative writ of mandamus as above shown, and said amended return being filed as above shown, said cause came on for hearing upon the above motions of the plaintiff and defendants for judgment upon the pleadings in said cause, and said motions being duly presented and the Court being duly advised in the premises, overruled the motion of the plaintiff for judgment on the pleadings, to which the plaintiff excepted, and sustained the motion of the defendant- for judgment upon the pleadings therein, to which the plaintiff duly excepted. The journal entry of such proceedings so duly made and filed is, with all the endorsements thereon, in words and figures as follows, to wit:

58 In the District Court of Noble County, Oklahoma Territory.

No. 2261.

J. B. BEADLES, Plaintiff,

vs.

A. E. SMYSER ET AL., Defendants.

Journal Entry.

And now upon this 2nd day of April, 1906, the same being one of the regular juridical days of the February Term, of the above entitled court this cause comes on for hearing, the plaintiff appearing by S. H. Harris, his attorney, and the defendants appearing by A. N. Whiteside, city attorney of the City of Perry, and attorney for all of the defendants. Whereupon the defendants asks and are granted permission to file an amended return to the alternative writ of mandamus. And thereupon by leave of the court the plaintiff and defendants each file their motion for judgment upon the pleadings, and the said motions coming on for hearing and the court being fully advised in the premises the motion of the plaintiff is overruled and denied, to which ruling the plaintiff duly excepts, and the motion of the defendants is sustained and judgment rendered

in favor of the defendants as appears from the final journal entry herein, to which ruling of the court the plaintiff duly excepts.

BAYARD T. HAINER, *Judge.*

O. K.
S. H. HARRIS,
Attorney for Plaintiff.
A. N. WHITESIDE,
Attorney for Defendants.

Endorsed on back: 2261—Beadles *vs.* Smyser *et al.*—Journal Entry—Filed April 2, 1906. Chas. L. Watson, Clerk, by W. S. Lamb, Deputy.

59 And thereupon on the 2nd day of April, 1906, said cause came on for judgment therein, and the Court in pursuance to its rulings upon the motions and proceedings above shown, entered judgment in said cause for the defendants, denying the peremptory writ of mandamus prayed for, to all of which the plaintiff excepted.

And thereupon, upon the same day, April 2, 1906, the plaintiff presented his motion for new trial in said cause, which motion is, with all the endorsements thereon, in words and figures as follows, to wit:

60 In the District Court of Noble County, Oklahoma Territory.

Number 2261.

J. B. BEADLES, Plaintiff,
vs.
A. E. SMYSER, Mayor; G. R. BYERS, W. B. BRENGLE, A. C. HINDE, HARRY SHORTMAN, CHAS. CHRISTOPH, E. J. MILLER, D. F. MARSHALL, J. H. FLOOD, City Councilmen, and W. R. FRY, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory, Defendants.

Motion for New Trial.

Comes now the plaintiff in the above entitled cause and moves the court to vacate, set aside and hold for naught the judgment of the court herein, and to grant the plaintiff a new trial upon the following grounds and for the following reasons, to wit:

First. Because the decision and judgment of the court are contrary to law.

Second. Because of error of law occurring in the rendition of said decision and judgment, and which were excepted to by the plaintiff.

S. H. HARRIS,
DALE & BIERE,
Attorneys for Plaintiff.

Endorsed on back: No. 2261—District Court, Noble County, O. T.—J. B. Beadles *vs.* A. E. Smyser, Mayor, *et al.*—Motion for new trial.—Filed Apr. 2, 1906, Chas. L. Watson, Clerk, by W. S. Lamb, Deputy.—S. H. Harris, and Dale & Bierer, Att'ys for Plaintiff.

61 Thereupon said motion for new trial being on April 2, 1906, duly presented to the Court, was by the Court overruled, to which plaintiff excepted; and upon application of plaintiff, appeal to the Supreme Court was allowed and the plaintiff granted thirty days in which to make and serve case made to the Supreme Court in said cause, and the defendants were allowed five days in which to suggest amendments thereto, same to be settled on three days' notice in writing. The journal entry of all of such proceedings of such consideration of said cause and the judgment and determination so rendered, the consideration of the motion for new trial, and exceptions taken and allowance of time for making and serving case made and settling said case made is, with all the endorsements thereon, in words and figures as follows, to wit:

62 In the District Court of Noble County, Oklahoma Territory.

Number —.

J. B. BEADLES, Plaintiff,

vs.

A. E. SMYSER, Mayor; G. R. BYERS, W. B. BRENGLE, A. C. HINDE, HARRY SHORTMAN, CHAS. CHRISTOPH, E. J. MILLER, D. F. MARSHALL, J. H. FLOOD, City Councilmen, and W. R. FRY, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory, Defendants.

Journal Entry.

Now on this 2nd day of April, 1906, come the defendants and file and present their return to the alternative writ of mandamus issued in this cause, and both parties being present by their counsel, the defendants ask that upon such return the peremptory writ of mandamus prayed for be denied. The court having examined the alternative writ of mandamus and the return thereto, finds under the law, as applied to the facts stated in the alternative writ of mandamus, that the peremptory writ of mandamus prayed for should be denied; and further finds that the facts stated in the alternative writ of mandamus show, as a conclusion of law, that all of the judgments set out in said alternative writ of mandamus have become dormant, and are barred by the statute of limitations.

It is therefore by the Court considered, ordered and adjudged that the judgments and each and all of them set out in the alternative writ of mandamus in this cause have become dormant, and are barred by the statute of limitations, and that under the facts as stated in the alternative writ of mandamus the plaintiff is not in law en-

titled to recover in this cause, and that the peremptory writ of mandamus prayed for should be and hereby is denied, and the costs of this cause taxed to plaintiff and assessed at $—; to each and all of which findings of fact and conclusions of law and the
63 judgment herein rendered the plaintiff at the time duly excepted.

Thereupon plaintiff presented his motion for a new trial in said cause, which motion being by the court duly considered, was overruled, to which ruling the plaintiff excepted. Thereupon the plaintiff prayed an appeal to the Supreme Court of the Territory of Oklahoma in this cause, and asked and was granted thirty days in which to make and serve a case made for the Supreme Court in said cause. The defendants were allowed five days after service of said case made in which to suggest amendments thereto, same to be settled on three days' notice in writing.

BAYARD T. HAINER, *Judge.*

O. K.
S. H. HARRIS,
DALE & BIERER,
Attorneys for Plaintiff.

O. K.
A. N. WHITESIDE,
Attorney for Defendants.

Endorsed on back: No. 2261—District Court, Noble County, O. T.—J. B. Beadles *vs.* A. E. Smyser, Mayor, *et al.*—Journal Entry.—Filed Apr. 2, 1906, Chas. L. Watson, Clerk, by W. S. Lamb, Deputy. Filed April 20, 1906, Benj. F. Hegler, Clerk Supreme Court.

64 The above and foregoing case made contains a true and correct statement and copy of all of the pleadings, motions, orders, findings, evidence and proceedings upon which judgment was rendered in said cause, and of all of the judgments, orders, findings and determinations made therein, and is in all respects true and correct, and presents the entire cause as the same was presented and determined in the District Court of Noble County, Oklahoma Territory.

S. H. HARRIS,
DALE & BIERER,
Attorneys for Plaintiff.

Filed April 20, 1906.

BENJ. F. HEGLER,
Clerk Supreme Court.

65 TERRITORY OF OKLAHOMA, *Noble County, ss:*

I, the undersigned attorney for the defendants in the above and foregoing cause and suit do hereby certify that the foregoing case made was duly served on me this 14 day of April, 1906, and that

I have examined said case made and find the same in all respects true and correct; and I hereby waive notice of the time and place of settlement of said case made, and consent that the same may be settled and signed by the Judge of the District Court of Noble County, Oklahoma Territory, at any time and place without my presence; and I waive the right of the defendants to suggest any amendments thereto.

A. N. WHITESIDE,
Attorney for Defendants.

Filed April 20, 1906.

BENJ. F. HEGLER,
Clerk Supreme Court.

66 TERRITORY OF OKLAHOMA, *Noble County, ss:*

This is to certify that the above and foregoing case made has been duly served in due time, and that no amendments were suggested thereto, and the right of amendments by defendants waived, and that the same has been duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same as above set forth is true and correct and contains a true and correct statement of all of the pleadings, motions, orders, evidence, findings, proceedings and judgments had in said cause; and I hereby settle, allow, certify and sign the same as true and correct, and do hereby order that the Clerk of the District Court attest the same with the name and seal of said court, and file the same of record as provided by law.

Witness my hand at Perry, Noble County, Oklahoma Territory, this 18th day of April, 1906.

BAYARD T. HAINER,
Judge of the District Court of Noble County,
Oklahoma Territory.

Attest:
CHARLES L. WATSON,
Clerk of the District Court of Noble County,
Oklahoma Territory,
By W. S. LAMB, *Deputy.* [SEAL.]

Filed April 19, 1906.

CHARLES L. WATSON, *Clerk,*
By W. S. LAMB, *Deputy.*

Filed April 20, 1906.

BENJ. F. HEGLER,
Clerk Supreme Court.

67 In the Supreme Court of the Territory of Oklahoma.

Number —.

J. B. BEADLES, Plaintiff in Error,
vs.
A. E. SMYSER, Mayor; G. R. BYERS, W. B. BRENGLE, A. C. HINDE, HARRY SHORTMAN, CHAS. CHRISTOPH, E. J. MILLER, D. F. MARSHALL, J. H. FLOOD, City Councilmen, and W. R. FRY, City Treasurer, of the City of Perry, Noble County, Oklahoma Territory, Defendants in Error.

I, the undersigned City Attorney of the City of Perry, Noble County, Oklahoma Territory, and attorney of record for the defendants in the above entitled cause in trial court, do hereby, on behalf of the defendants and all of them, waive the issuance and service of summons in error in the above entitled cause, and hereby enter the appearance of the defendants therein.

A. N. WHITESIDE,
Attorney for Defendants in Error.

Filed April 20, 1906.

BENJ. F. HEGLER,
Clerk Supreme Court.

68 Said Case Made is endorsed on the back as follows, to wit: No. 1930—J. B. Beadles, Plaintiff in error, *vs.* A. E. Smyser *et al.*, Defendants in error—Petition in error and case made—Filed April 19, 1906, Charles L. Watson, Clerk, by W. S. Lamb, Deputy—Filed April 20, 1906, Benj. F. Hegler, Clerk Supreme Court.

69 And afterward, at the June, 1906, Term of said Supreme Court of the Territory, on the Twelfth day of June, 1906, the following proceeding was had in said cause, to wit:

#1930.

J. B. BEADLES, Plaintiff in Error,
vs.
A. E. SMYSER, Mayor ET AL., Defendants in Error.

Comes now S. H. Harris of counsel for plaintiff in error, and makes oral argument herein; and cause is submitted on the record, briefs and oral argument.

70 And afterward, at the June, 1906, Term of said Supreme Court, on the Sixth day of September, 1906, the following proceeding was had in said cause, to wit:

#1930.

J. B. BEADLES, Plaintiff in Error,
vs.
A. E. SMYSER ET AL., Defendants in Error.

And now this cause comes on for final determination and decision by the Court upon the record, briefs and oral argument submitted herein,

And the Court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the District Court herein should be affirmed, at the cost of plaintiff in error,

It is therefore ordered and adjudged by the Court, that the judgment of the District Court in this cause be and the same is hereby affirmed, at the cost of plaintiff in error.

Opinion by Burwell, J. All the Justices concurring except Hainer, J., who presided at the trial below, not sitting.

To which decision plaintiff in error excepts.

Which opinion reads in words and figures as follows, to wit:

71 In the Supreme Court of the Territory of Oklahoma, June Term, 1906.

Filed September 6, 1906.

No. 1930.

J. B. BEADLES, Plaintiff in Error,
vs.
A. E. SMYSER, Mayor of the City of Perry, ET AL., Defendants in Error.

Syllabus.

Mandamus—Judgment Against City of First Class—Execution—Statutes of Limitation—Resolution by City Council:

1. In the absence of statutory inhibition, an ordinary execution may issue on a judgment against a city of the first class, and, while on the ground of public policy, it cannot be levied on any of the general revenues of the city, either before or after they are collected, or upon any property either real or personal, which is reasonably necessary for government purposes, still, if any property can be found which is not reasonably necessary for the public welfare, and which is held by the city as private property for its benefit, it may be levied upon and sold to satisfy an execution.
2. Under section 4337 of the Statutes of Oklahoma of 1893, which provides that, "if execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered, in any court of record in this Territory, or

if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor," a judgment against a city of the first class becomes dormant after five years from the date of its rendition, unless the judgment creditor, within such time, causes execution to issue thereon.

3. Where a judgment creditor fails to have execution issued within five years on a judgment against a city of the first class, and also fails to revive such judgment within one year after it becomes dormant, it will be treated as barred by the statute of limitation, and the courts will deny the aid of mandamus to compel payment of the same.
4. An agreement between practically all of the judgment creditors of a city, that such city shall pay such creditors in the order of priority of the date thereof, instead of paying such judgment creditors their *pro rata* shares, and a resolution of a city council which refers to such agreement and orders the city treasurer to pay such judgments according to such contract, do not change the legal status of the city toward any of such creditors, nor do they excuse any judgment creditor from suing out an execution within five years of the date his judgment was rendered, or from securing a revivor of his judgment within one year after it became dormant.

Appeal from the District Court of Noble County—Bayard T. Hainer, Trial Judge.

Affirmed.

S. H. Harris, and Dale & Bierer, for Appellant.
A. N. Whiteside, for Appellee.

Opinion of the Court by Burwell, J.

This is an action of Mandamus commenced by the plaintiff to compel the officers of the city of Perry to take steps looking toward the payment of some thirty-two judgments against that city which amount in all to something over sixteen thousand dollars. All of these judgments were rendered more than six years prior to the commencement of this action, and are now owned by the plaintiff. No execution was ever issued on any of these judgments, nor have any of them been revived under the statute. The answer pleads the statute of limitation, and this is really the only question involved in the case.

It is contended by the defendant that under section 4337 of the Statutes of Oklahoma of 1893, the judgments involved in this action are dormant. It provides as follows:

"If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered, in any

court of record in this Territory, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor."

72 This court had occasion to construe this identical statute in the case of J. B. Beadles *v.* W. R. Fry, City Treasurer of the City of Perry, *et al.* 15 Okla. P. 428; and it was therein held that this statute of limitation would run in favor of a city of the first class on a judgment against it unless the judgment creditor sue out an execution within five years from the date of its rendition. It was also stated in that opinion that, "Where a judgment creditor fails to have execution issued within five years on a judgment against a city of the first class, and also fails to revive such judgment within one year after it becomes dormant, it will be treated as barred by the statute of limitation, and the courts will deny the aid of mandamus to compel payment of the same."

In that case as in this the plaintiff contended that the city council had passed a resolution approving an agreement entered into by all of the judgment creditors of the city, to the effect that all judgments should be paid in the order of their rendition. It is insisted that this contract and resolution took the judgments in question out of the statute of limitation, even if such statute would run in favor of a city, which plaintiff denies. All of these questions were decided against the contention of the plaintiff in the case referred to.

These and other questions were fully discussed in that opinion. The two cases involved exactly the same questions, and upon that authority the judgment of the lower court is hereby affirmed, at the cost of the appellant.

All of the justices concurring, except Hainer, J., who presided at the trial below, not sitting.

To which decision plaintiff in error excepts.

73 In the Supreme Court of the Territory of Oklahoma.

UNITED STATES OF AMERICA,
Territory of Oklahoma, ss:

Certificate.

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that the foregoing 72 pages, numbered from 1 to 72, inclusive, are a full, true and complete transcript of the record and all proceedings in said Supreme Court in the case of J. B. Beadles, Plaintiff in error, *vs.* A. E. Smyser, Mayor, *et al.*, Defendants in error, as the same remain upon the files and records of said Supreme Court.

In testimony whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court, at the City of Guthrie, this 16 day of October, A. D. 1906.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk Supreme Court of the Territory of Oklahoma.

74 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the Territory of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Territory of Oklahoma before you, or some of you, between J. B. Beadles, Plaintiff in Error and Appellant, and A. E. *Smyers*, Mayor, G. R. Byers, W. B. Brengle, A. C. Hinde, Harry Shortman, Chas. Christoph, E. J. Miller, D. R. Marshall, J. H. Flood, City Councilmen, and W. R. Fry, City Treasurer of the City of Perry, Noble County Oklahoma Territory, Defendants in Error and Appellees, a manifest error hath happened, to the great damage of the said J. B. Beadles, Plaintiff in Error and Appellant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of October, in the year of our Lord one thousand nine hundred and six.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of Oklahoma Territory.

Allowed by
JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

Endorsed on cover: File No. 20,449. Oklahoma Territory supreme court. Term No. 484. J. B. Beadles, plaintiff in error and appellant, *vs.* A. E. Smyser, Mayor, G. R. Byers, *et al.*, City Councilmen, and W. R. Fry, City Treasurer, of the City of Perry, Noble Co., Oklahoma. Filed November 7th, 1906. File No. 20,449.

IN THE

Supreme Court of the United States

October Term 1906.

J. B. BEADLES,
Plaintiff in Error and Appellant,

vs.

A. E. SMYSER, Mayor,
G. R. BYERS, et. al., City Councilmen,
AND
W. R. FRY, City Treasurer of the City of Perry, Noble County, Oklahoma Territory,
Defendants in Error and Appellees.

No. 484.

WRIT OF ERROR AND APPEAL FROM THE SUPREME COURT OF OKLAHOMA TERRITORY.

STATEMENT OF FACTS.

This is an action in mandamus begun in the District Court of Noble County, Oklahoma Territory, against the Mayor and City Councilmen and City Treasurer of the city of Perry, a city of the first class in Noble county, Oklahoma Territory, to compel the said city through its proper officers to recognize

certain judgments which were duly rendered by the Probate Court and a Justice Court of Noble County, Oklahoma Territory, against the city of Perry, and which judgments amount to over $16,000, as valid and subsisting judgment debts of the city of Perry, and to compel the levy of taxes to pay such judgments and the application of the moneys derived from such tax levies and in the judgment fund of the city of Perry and in the hands of the City Treasurer thereof, to the payment of these judgments. (See petition in mandamus and alternative writ, pages 14 to 31 of record.)

The list of the judgments rendered, with the date of rendition and the amounts thereof, appear as contained in the alternative writ on page 24.

It appears from this statement in the writ that these judgments were rendered nearly all of them during the year 1898 and the balance during the early part of the year 1899. (Page 24.) and that these judgments were all rendered upon city warrants, duly and regularly issued upon the general fund of the city of Perry for the payment of the valid, subsisting and outstanding obligations of said city, and that no funds had ever been provided by the city of Perry with which to pay said outstanding general warrants of the city of Perry when said judgments were rendered.

It appears from the alternative writ (page 25) that during the year 1898 various other judgments were rendered against the city of Perry prior to the judgments in controversy, and that these other judgments had been paid by the city of Perry down to the first of plaintiff Beadles's judgments, that of H. A. Smith, the last in the column of judgments, rendered Jan. 8, 1898, and that on about and prior to Dec. 3, 1901, the various judgment creditors of the city of Perry entered into a written agreement, which was duly filed with the then City Treasurer, one Joe Dolezal, and said agreement

was signed by the various judgment creditors of the city of Perry, being as follows, to-wit:

"I, the undersigned judgment creditor holding judgment against the City of Perry, Noble County, Oklahoma Territory, hereby ask that the City Treasurer pay all judgments against the City of Perry in order of rendition, hereby waiving right to payment pro rata, if such right exists, and this waiver shall apply to all grantees and assigns. Said judgments are in amounts and dates as follows:" (Page 25.)

Following that agreement appeared the names of the said listed judgment creditors and of each of the judgment creditors of the city of Perry except a very small portion of such judgment creditors of Perry, not herein named and listed and the ones entering the agreement embraced of an indebtedness of said city of about $22,000, all of the judgment creditors excepting about $4,000, and this agreement and waiver was presented to the City Treasurer during the year 1901 and was followed by him as being satisfactory to the creditors, and the city of Perry, and on or about the 3rd day of December, 1901, said agreement was presented to the City Council of said city of Perry then in session, and the city of Perry adopted and passed the following resolution with reference thereto:

"Whereas, the judgment creditors holding judgments against the city of Perry have practically all signed written waivers of the right if such right exists, to payment of said judgments pro rata, and therein consent to the payment of said judgments in the order of their rendition against said city:

"Therefore, be it resolved that the City Treasurer is hereby authorized and directed to pay the said judgments existing against the city of Perry in the order of their rendition out of the funds now on hand and as they shall accrue in the judgment funds."

And it appears from the alternative writ that this agreement made between the judgment creditors generally of the

city of Perry and said city was then and thereafter and ever since and up to the time this controversy commenced during the year 1905 followed and acted upon by the city of Perry, and this plaintiff and the judgment creditors representing the judgments embraced in this writ, all relied upon said agreement existing between them and the city of Perry as to the payment of said judgments so rendered against the city of Perry. (Page 26.) It also appears from the writ that under the law of the Territory of Oklahoma as it has existed through out the life of all of these judgments and since the rendition thereof, it is provided that a judgment fund shall be and is created out of which judgments against municipalities like the city of Perry shall be and are paid, and under said law all judgment demands against such municipalities must be paid by moneys raised by the levy of taxes paid into the said judgment fund, and it is alleged in the writ "and said judgments can be paid in no other way and the said judgments cannot be paid except by moneys which are raised by taxes and paid into the said judgment fund, and no judgment or any part thereof can be paid until the moneys therefor are so raised by taxation and paid into said fund."

It is also alleged in the writ that no judgment could be collected against the municipality under the law of the Territory of Oklahoma by execution, and it also appears (page 27):

"The city of Perry has all that time had no property whatever subject to levy of an execution, and under the law could neither acquire nor hold any property subject to execution, and the issuance of an execution for the collection of said judgments of plaintiff would have been useless; that the method and means provided by law for the payment of all judgments, including those of plaintiff hereinbefore listed, against the city of Perry has been during all the perior of the existence of said judgments as aforesaid, by the levy and collection of taxes into said judgment fund for the payment

of said judgments, and said judgments could be paid in that method and that method only, but have not been paid by reason of the fact that there have never been sufficient moneys in the said judgment fund of the city of Perry to pay all of said judgments, and no pro rata portion thereof has been paid by reason of the fact that the city of Perry entered into the above and foregoing agreement mentioned as of date Dec. 3, 1901, for the payment of all judgments against the said city of Perry in their order of rendition, and the moneys which have accrued from time to time in the judgment fund of the city of Perry have therefore been applied to judgments of prior date to those held by this plaintiff."

It also appears that during the life of these judgments up to the year 1905, when this controversy commenced, (this action being begun on the 10th day of March, 1906) the city of Perry had recognized and met the said obligation imposed upon it by law to make an annual levy of taxes not to exceed five mills on the dollar to create a fund with which to pay said judgments, and that out of said fund judgments of the city of Perry were paid down to the early part of the year 1905, and that since that time the City Treasurer has, under the direction of the Mayor and City Council of the city of Perry, been declining to pay any of the judgments of this plaintiff, either in their order of rendition, or to pay the same pro rata among the said judgments, and that there has accumulated in the hands of the City Treasurer of the city of Perry the sum of $2,228.96 of money held in the judgment fund of the city of Perry for the payment of judgments against said city, and which moneys have accrued in his hands and been realized upon the said tax levies of five mills made annually for the judgment fund of the city of Perry, and which the City Treasurer holds for that purpose, and that the city of Perry had each year, up to the year 1905, recognized all of these judgments as valid and subsisting judgments of the city of Perry, and that it was its duty to continue to make, as it had made down to and in-

cluding the year 1905, an annual levy of five mills, the amount which had each year been made prior to that time for the payment of judgments against said city.

And it further appears that notwithstanding such tax levies, and notwithstanding the fact that the City Treasurer has in his hands a considerable fund as hereinbefore stated which could and should be applied as the law provides upon the payment of the outstanding judgments against the city of Perry, the said Mayor and City Council and City Treasurer of said city of Perry do each and all decline and refuse to obey the law in the premises, and decline and refuse to recognize the judgments of plaintiff as valid and subsisting judgments against the city of Perry, and decline to apply the moneys as they come into the hands of the City Treasurer to the rendition of said judgments; but it appears in the writ that said officers of said city of Perry "deny the validity of the said judgments so held by plaintiff. ON THE SOLE GROUND THAT THE SAME HAVE BECOME DORMANT AND ARE BARRED BY THE STATUTE OF LIMITATION;" and the said city of Perry, through the said officers, is threatening to continue to disregard the rights of plaintiff, and to refuse to recognize the validity of plaintiff's said judgments, and is threatening to apply the moneys as they accrue from time to time in the judgment fund of the city of Perry to the payment of other subsequent judgments against the city of Perry, to the total disregard of the aforesaid judgments of the plaintiff, and to pay out and distribute the moneys and funds accruing in said judgment fund of the city of Perry to the payment of other judgments, and that the plaintiff is entitled under the law to have these judgments recognized and paid.

It further appears in the writ that under the law of the Territory of Oklahoma, said judgments have not and cannot become dormant, and the statute of limitation cannot apply

thereto until money is provided in the judgment fund of the city of Perry with which to pay said judgment debts of the city of Perry, and that said funds have not been provided sufficient to pay said judgments, although the full amount provided by law, the five mill annual levy, has been levied by said city, and that by reason of such levy the plaintiff and the prior holders of said judgments now held by plaintiff could not have resorted to mandamus, their only remedy, to compel the levy of a tax to pay said judgments, as the city of Perry has met said obligation to make said levy by voluntarily levying the full tax provided by law for such judgment fund down to the year 1905.

It further appears that if the city of Perry and its said officers are allowed to disregard the law in the premises and to repudiate the judgments held by plaintiff, and to decline to recognize the same as valid judgments against the city of Perry, and to pay out the tax money accruing from said annual levies of five mills so made for the payment of judgments against the city of Perry and to apply said moneys to the payment of subsequent judgments held by other persons than this plaintiff against the city of Perry, that plaintiff's judgments will be entirely lost and will be entirely worthless, and the amount of said judgments in the sum of more than $16,000 will be lost to this plaintiff, and that the plaintiff, has no adequate remedy at law except by mandamus.

The writ further alleges the presentment to the Mayor and Councilmen and City Treasurer of said city of Perry of a correct list of plaintiff's judgments, and a demand by plaintiff that all of said officers recognize the same as outstanding and valid judgments against the city of Perry, and continue to make the full five mill levy for the payment of said judgments and apply the moneys arising therefrom to their payment, and that this demand was duly presented to said Mayor

and City Councilmen and City Treasurer of the city of Perry and refused. (Pages 28, 29 and 30.)

To this alternative writ the defendants filed their answer stating "that each and all of said judgments set out in said alternative writ of mandamus have become dormant, through and by the fault and neglect of said plaintiff, as shown by said alternative writ of mandamus; that no execution was ever issued on any of said judgments before said judgments became dormant and that no proceeding was ever had or begun by which any of said judgments have been revived, and therefore this action of plaintiff is barred by the statute of limitations." (Page 33.)

Upon the alternative writ and this answer each party made a motion for judgment on the pleadings. (Page 34.) The motion of plaintiff for judgment was overruled, to which plaintiff excepted, and that of the defendants was sustained, to which plaintiff Beadles excepted, and judgment was rendered for the defendants denying the writ prayed for to which plaintiff Beadles excepted. (Page 35.)

The case was duly appealed to the Supreme Court of the Territory of Oklahoma, where, on Sept. 6, 1906, the Supreme Court passed upon the cause and affirmed the judgment of the trial court and held that as no execution was issued upon the judgments for five years after their date, the judgments had become barred by the statute of limitation, and affirmed the judgment denying the writ. (Pages 41, 42 and 43.)

From this judgment we have prosecuted writ of error and appeal to this court, and the transcript and assignments of error were filed in this court on Nov. 7, 1906.

ASSIGNMENTS OF ERROR.

The assignments of error set forth and relied upon by plaintiff in error are the following:

First. Because said court erred in its said ruling and decision in holding that in the absence of a statutory inhibition, an ordinary execution may issue on a judgment against a city of the first class in Oklahoma Territory.

Second. Because the said court erred in holding and deciding in said opinion that if an execution shall not be sued out upon, and within five years from the date of, a judgment against a city of the first class in Oklahoma Territory, then said judgment becomes dormant and ceases to operate as a judgment against such municipality.

Third. The said court erred in holding and deciding in said opinion that unless a judgment creditor under a judgment against a city of the first class and municipality in Oklahoma Territory causes an execution to issue upon said judgment within five years from the date of said judgment, then said judgment becomes dormant, invalid and void, and ceases to be an obligation of such city.

Fourth. Because the said court erred in ruling, holding and deciding that when the plaintiff in error and appellant failed to cause an execution to be issued out of the court rendering the judgments involved in said cause within five years from the date of said judgments, said judgments became dormant and ceased to be an obligation of the city of Perry, and that the District Court did not err in refusing to enforce the said judgments against the city of Perry by mandamus, as prayed for.

Fifth. Because the said court erred in ruling, holding and deciding that when a judgment creditor in Oklahoma Ter-

ritory fails to have execution issued within five years on a judgment against a city of the first class, and also fails to revive said judgment within one year after it becomes dormant, it will be treated as barred by the statute of limitations. and the court will deny the aid of mandamus to compel payment of the same.

Sixth. Because said court erred in ruling, holding and deciding that because the plaintiff or his transferrors of the judgments sued upon failed to have execution issued within five years from the date of said judgments against the city of Perry, and also failed to revive said judgments within one year after they became dormant, the said judgments were therefore barred by the statute of limitation, and that the District Court held correctly in denying the aid of mandamus to compel the payment of said judgments.

Seventh. Because the said court erred in holding and deciding that the agreement between practically all of the judgment creditors of the city of Perry, Oklahoma Territory, that said city should pay such judgments in the order of priority of the date thereof instead of paying such judgment creditors their pro rata shares out of the money collected by taxation for the payment of said judgments, and which agreement was ratified and approved by a resolution of the City Council of the city of Perry, did not change the legal status of the city of Perry towards any of such judgment creditors, and did not excuse the judgment creditors from suing out an execution upon said judgments within five years of the date said judgments were rendered, or from securing a revivor of said judgments within one year after they became dormant.

Eighth. Because the said court erred in not holding and deciding that under the laws of the Territory of Oklahoma, the said judgments of the city of Perry set out in the alternative writ of mandamus, and each of them, were valid and

subsisting judgments against the city of Perry, and were not dormant, and were not barred by the statute of limitations.

Ninth. Because the said court erred in not holding and deciding that under the laws of the Territory of Oklahoma an execution could not be issued upon or to enforce a judgment or judgments against the city of Perry, Oklahoma, and that the same could only be enforced by the levy of taxes each year to provide a fund out of which to pay such judgments.

Tenth. Because the said court erred in holding that the said judgments were barred by the statute of limitation, and in not holding that such judgments were not barred by the statute of limitation, and that the statute of limitation would not begin to run upon said judgments until moneys were provided by the levy of taxes for the judgment fund of the city of Perry for the purpose of paying said judgment obligations against the city of Perry, as provided by the laws of the Territory of Oklahoma.

Eleventh. Because the said court erred in not holding that the agreement between the judgment creditors of the city of Perry for the payment of said judgment obligations of the city of Perry in the order of rendition was a valid and subsisting contract between the said judgment creditors and was approved by and binding upon the city of Perry, and that the city of Perry was estopped from its attempt to take advantage of the statutes of dormancy or of limitation in its a empt to defeat the enforcement of said judgments, and estopped from claiming that the said judgments had been barred by the statute of limitation or dormancy until a fund had been provided under the law and under said contract for the payment of said judgments.

Twelfth. Because the court erred in not holding that the trial court, the District Court of Noble County, erred in not holding and deciding that the plaintiff, J. B. Beadles, was

entitled to a judgment against the said Mayor, City Council and City Treasurer of the city of Perry for the enforcement of his said judgments as set out in his petition and prayed for therein, and in the alternative writ of mandamus and in not holding that the plaintiff was entitled to the enforcement and collection of his said judgments in the sum of Sixteen Thousand, Three Hundred Four and fifty-one hundredths Dollars ($16,304.51) against the city of Perry. (Pages 5, 6, 7.)

ARGUMENT.

1. STATUTE OF LIMITATION NO DEFENSE IN MANDAMUS PROCEEDINGS.

This action being one in mandamus to compel the city of Perry to recognize the validity of plaintiff's judgments and to pay out the moneys already accrued in the judgment fund upon these judgments, and to continue to make levies to enforce the same, the statutory period of limitation fixed by law for civil actions does not run against the relief which we ask.

This was the sole defense presented in this case in the Oklahoma courts. The opinion states (Page 42):

"The answer pleads the statute of limitation, and this is really the only question involved in the case."

The court passed upon this defense of the statute of limitation in a mandamus case coming from Oklahoma in the recent case of Duke, Mayor, et al. v. Turner et al., 204 U. S., 623, which involved the enforcement of certain municipal warrants issued by the city of Guthrie. Those warrants were

issued July 1, 1893. The action in mandamus to compel the levy of a tax to pay these obligations was not begun until nearly eight years after the issuance of the warrants, but this court held that under the facts of the case:

"The question is, should the writ be refused because the relator has slept upon his rights for an unreasonable time, and has the delay caused prejudice to the defendant, or to the rights of other interested persons?

We perceive nothing in the record to warrant that conclusion."

We claim that the same rule should apply in this case as in that. The syllabus of that case reads:

"While the authorities are in conflict as to whether a statute of limitations, without express words to that effect governs a proceeding in mandamus, such a proceeding is not, under the Oklahoma Code, a civil action and, therefore, not within the terms of the three year statute of limitations applicable to contracts created by statute; and in that Territory, if the relator is otherwise entitled to the writ, it should not be denied unless he has so slept upon his rights for such an unreasonable time that the delay has been prejudicial to the defendant or the rights of other interested parties."

We claim, then, that this being an action of mandamus like that, that the statute of limitations has not run, and that we are entitled to the writ, and that there is nothing in the case to show that we have in any way slept upon our rights.

The facts stated which are admitted—at least they are not denied by the answer which denies none of the facts of the writ but pleads only the alleged dormancy of these judgments and that they are therefore barred by the statute of limitation,—are that these judgments were all recognized as valid down to the year 1905, and that on Dec. 3, 1901, the city of Perry entered into an agreement with these judgment creditors J. B. Beadles and others who have assigned and trans-

ferred their judgments to J. B. Beadles, that whereas the judgment creditors waived the right to payment pro rata, if such right existed, said judgments should be paid in the order of rendition of such judgments against the city of Perry. (Pages 25 and 26.)

It appears uncontrovertedly that this order of payment was exercised by the city of Perry and the judgments against the city of Perry paid down to the first of the Beadle's judgments, that rendered Jan. 8, 1898, in favor of H. A. Smith in the sum of $20.35, and when this judgment was reached, after that order of procedure had been in force for years, during which time the alleged five year statute of limitation had run, the city of Perry for the first time claimed the dormancy of these judgments, although it is admitted by admitting the allegations of the alternative writ that the city of Perry had continued throughout all these years and down to and including the year 1905 to levy the full five mills of tax which could be levied under the laws of Oklahoma to create a judgment fund with which to pay these and the other judgments against the city of Perry, and then for the first time the city of Perry refused to recognize these judgments as valid, and to apply the tax moneys as received to the payment of these judgments, and was threatening to proceed to pay out these moneys upon other judgments rendered later against the city of Perry, to the full defeat of all of plaintiff's judgments in the sum of over $16,000.

It cannot be maintained in view of this course of action of the city of Perry in recognition of these judgments and in the making and carrying out of its own agreement with the creditors of the city to pay the judgments in order of rendition and the reliance by plaintiff and the holders of these judgments upon this agreement by reason of which no proceeding had been taken to enforce at an earlier date, the rec-

ognition and payment of all or of any part of these judgments, that the plaintiff or his prior holders of these judgments have been guilty of any laches by reason of which the plaintiff should now be held to have slept upon his rights for an unreasonable time, and thus deprived of his rights to resort to mandamus to compel the enforcement of these judgments.

The principle involved, here we claim, is the same as that in the Duke, Mayor, v. Turner case, and the application of that decision to this case should entitle us to the writ of mandamus which we ask.

II. UNNECESSARY TO REVIVE MUNICIPAL JUDGMENTS.

The Supreme Court of Oklahoma, after stating that the only question involved in this case is the statute of limitation, proceeded to hold that the statute had run and that these judgments were barred under Section 4337 of the Statutes of Oklahoma of 1893, (Section 4635, Wilson's Ann. Stat. Okla. 1903), which is as follows:

> "If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered, in any court of record in this territory, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor." (Page 42 of record.)

The court held that section applicable to judgments against municipalities in this Territory, and upon the authority of the prior case of Beadles v. Fry, City Treasurer of the city of Perry, 15 Okla., 423, held that:

> "Where a judgment creditor fails to have execution issued within five years on a judgment against

> a city of the first class and also fails to revive such judgment within one year after it becomes dormant, it will be treated as barred by the statute of limitation and the courts will deny the aid of mandamus to compel payment of the same."

We claim that THIS SECTION OF THE OKLAHOMA STATUTE PERMITTING THE ENFORCEMENT OF A JUDGMENT BY EXECUTION and providing for the dormancy of such judgment if execution is not issued within five years, or, if five years shall have intervened between the date of the last execution issued on such judgment and the time of issuing out of another writ of execution such judgment shall become dormant and cease to operate as a lien on real estate, HAS NO APPLICATION TO JUDGMENTS AGAINST MUNICIPALITIES IN THIS TERRITORY WHICH ARE COLLECTIBLE ONLY BY THE LEVY OF TAXES WHICH ARE REQUIRED BY THE LAW TO BE MADE TO CREATE A JUDGMENT FUND OUT OF WHICH TO PAY SUCH JUDGMENTS.

It is our contention that it is only in the absence of statutory provision for the payment of judgments against municipalities that they may be collected by execution at all, even if the municipality has any private property out of which the judgment may be collected. The law never requires the doing of a useless thing, and as we have shown in the statement of facts, it is alleged in the writ and not denied by the respondent (Record, page 26), that under the law of Oklahoma these judgments must be paid out of the judgment fund.

> "By moneys raised by the levy of taxes and paid into and accruing in said judgment fund, and said judgments can be paid in no other way, and said judgments cannot be paid except by moneys which are raised by taxation and paid into said judgment fund."

And, also, that

> "The city of Perry has all that time had no property whatever subject to the levy of an execution, and under the law could neither acquire nor hold any property subject to execution, and the issuance of an execution for the collection of said judgments of plaintiff would have been useless; that the method and means provided by law for the payment of all judgments, including these of plaintiff herein listed against the city of Perry has been during all the period of the existence of such judgments as aforesaid, by the levy and collection of taxes into said judgment fund for the payment of said judgments and said judgments could be paid in that method and that method only, but have not been paid by reason of the fact that there have never been sufficient moneys in said judgment fund of the city of Perry to pay all of said judgments." (Page 27 of record.)

The law as we allege it to exist and which the city of Perry did not deny in its answer, and as we will also show in this brief, not only has provided the city of Perry, as we allege, with no private property with which these judgments could possibly at any time have been paid, but also commands the payment of them in a particular way, that is, by funds derived from the levy of taxes. The law never requires the doing of a useless thing, and it would have been useless for plaintiff to have attempted to have collected these judgments by the issuance or levy of an execution; and the very authority which the Supreme Court of Oklahoma in the Beadles v. Fry case makes the basis of its rule only affirms the right to issue execution upon municipal judgments IN THE ABSENCE OF STATUTORY PROVISION to otherwise collect the judgment.

As quoted in that case, Section 576 of Vol. 2, 3rd edition page 572, of Dillon on Municipal Corporations, reads:

> "On principle, in the absence of statutable provision, it would seem to be a sound view to hold that

> the right to contract and the power to be sued gives the creditors a right to recover judgments; that judgments should be enforceable by execution against the strictly private property of the corporation, but not any against property owned or used by the corporation, for public purposes."

That rule is modified by Mr. Dillon in his fourth edition of the same work, Vol. 2, Section 576, page 674, in the first part of the statement as follows:

> "On principle, in the absence of statutable provision, OR LEGISLATIVE POLICY IN THE PARTICULAR STATE, it would seem," etc; so that the author in his later work must be understood as declaring that in the absence of both STATUTORY PROVISION and LEGISLATIVE POLICY of the state providing for the collection of municipal judgments by other process than execution, execution may issue to enforce such judgment, and his later work must be taken as an emphasis upon the condition that there must be a clear absence of legislation providing for collection of municipal judgments otherwise than by execution in order that such process may be permitted against a municipality.

We will in this brief show to the court that there is not only not an absence of statutable provision in this Territory, but that there is a clear statute and legislative policy providing for the collection of municipal judgments, not by execution, but by a tax system which the municipal officers are enjoined annually to follow in the payment of judgment debts. Not only, then, is there not an absence of statutory provision and legislative policy on the subject in this Territory, which is a clear prerequisite to the application of this rule of Mr. Dillon, but the other authorities cited by the Oklahoma Supreme Court to support this decision which is so clearly out of harmony with prior decisions of this court, are none of them based

upon the laws or taken from states having statutes like Oklahoma concerning the annual levy of taxes to pay judgments. This will appear from a brief review of the cases cited by the Oklahoma Supreme Court in the Beadles v. Fry case.

In the case of Hart v. City of New Orleans, which does not appear where cited, but does appear in Vol. 12, Fed. Rep., page 292, it would appear that there was an effort in Louisiana to prevent the enforcement of the municipal judgments. Concerning the act of the legislature of that state the court said:

> "Counsel may divide the act and say registration is reasonable, therefore you shall register your judgment; not to have any remedy is unreasonable, therefore you may have execution; but the court cannot so divide the act. We think we must take all or none. If we take all of the act the court can issue neither MANDAMUS nor execution against the city in any event."

It also appears there that the city had some private property which were sugar-sheds, and these it was held under the legislation of that state could be sold on execution to pay the judgments against the city of New Orleans.

There were certainly two distinct conditions which existed there which do not exist here, First: The legislature had attempted to deprive the creditor of any means at all to enforce these judgments, and thus it was held that the Federal courts could control the execution of their own judgments by the ordinary process of execution. Second. In that case there was no other process and, there, private property did exist with which the judgments could be paid.

The case of State ex rel Courter v. Buckles, (Ind.) 35 N. E., 846, is a decision from one of the states where the law makes no provision for the collection of judgments by an annual specific levy of taxes and the decision itself clearly shows

that it is based on this condition of legislation, for the court said:

> "There is nothing in the law which creates these corporations that in any manner conflicts with the view that judgment against them may be enforced by execution if the same can be levied and made out of the property other than that needed for governmental purposes."

But in this Territory there is something in the law which conflicts with that rule, and that something is the positive requirement to enforce the judgments and pay them by the levy of taxes. That Indiana case is also simply a case where a sheriff was sought to be amerced for an entire failure to make return of an execution.

The next case cited by the court to sustain its rule is City of Laredo v. Benavides, 25 S. W. 482. An examination of that case shows that it was an injunction brought to restrain the enforcement of a judgment in a condemnation proceeding to take land for the city's use, and in which proceeding a judgment for damages had been rendered in favor of the landowner. The case shows that the statutes of the state provided that the award of damages should be merged into a judgment on which THE NECESSARY PROCESS TO ENFORCE THE SAME might issue. Article 4202 of the Texas statutes provide in this respect:

> "If no objections are filed to such decision within the time prescribed in the preceding article the county judge shall cause the said decision to be recorded in the minutes of his court AND SHALL MAKE THE SAME THE JUDGMENT OF SAID COURT AND MAY ISSUE THE NECESSARY PROCESS TO ENFORCE THE SAME."

There was, then, not as under our legislation, no statute providing for execution upon a municipal judgment and a specific statute requiring the annual levy of taxes to pay such

judgment, but there was no statute in Texas providing for such tax levy, but a specific law providing for the necessary process which was naturally held to be an execution, for that is the usual necessary process to enforce a judgment. The court on the question said:

> "Now, what is the effect, and what are the rights af the several parties under this judgment? What is determined by it, and how and when can it be enforced? This judgment must be considered final, and as settling everything involved in the right of the city to appropriate the property, and the right of the appellees to receive, as adequate compensation therefor, the amount awarded by the judgment. * * * * *
>
> If the obligation of the corporation or municipality to pay or deposit the money before taking the property was the only security intended for the protection of the owner, our statute would not have provided for the issuance of the necessary process to enforce the judgment fixing the compensation to be paid the owner. This 'necessary process' applies to the judgment fixing the compensation as well as to any other part of the judgment; for it is the 'decision of the commissioners stating the amount of damages due the owner,' or, in case of appeal, the verdict of the jury assessing the damages, that is 'made the judgment of the court upon which may issue the necessary process to enforce the same.'
>
> We therefore conclude that the judgment upon which the execution is sought to be enjoined entitled the appellees, absolutely, to the compensation fixed by it; that they had the right to an execution, as the necessary process to enforce it; and that the injunction was rightfully dissolved by the county court, and that its judgment should be affirmed."

On the rehearing of the same case, the opinion of which follows the above referred to decision, the court stated and recognized the general rule that an execution was not the

proper method by which to enforce the payment of municipal judgments in the following language:

> "The general rule seems to be that a judgment against a municipal corporation is ordinarily no more than the establishment of a valid claim, for which it is the duty of the proper officers to provide means of payment out of the revenues of the defendant, and that it is error to award or issue execution on such judgment. Freem. Ex'ns., section 22. But the courts of some of the states hold that property belonging to cities, not held or used for governmental purposes, the seizure of which would not suspend or impair the exercise of the governmental functions delegated to such cities, is subjected to execution."

That decision, therefore, which is based upon specific legislation which is just opposite from ours, ought not to have been cited by our court as an authority for a decision which squarely overturns the doctrine of that court already so clearly established declaring that the statutes of limitation did not run upon municipal obligations where it is the duty of such municipality to provide by annual levy of taxes a fund with which to pay the debt until the fund has been provided. Not only that, but it also appears in that case that there was property levied upon which was subject to execution under the laws of that state, while here it is alleged in the alternative writ (page 27) and admitted by the pleadings, that

> "There is no provision of law for the levy of an execution against a municipality, and under the law of said Territory, no execution, if issued against the city of Perry, could be or could have been, in the years intervening since and including 1898, levied upon any property of the city of Perry, for the city of Perry has all that time had no property whatever subject to levy of an execution, and under the law could neither acquire nor hold any property subject to execution, and the issuance of an execution for the collection of said judgments of plaintiff would have been useless."

There is, likewise, in the next case of Murphree v. City of Mobile, (Ala.) 18 So., 740, a conspicuous absence of any legislation like that in this territory requiring judgments to be paid from a fund derived from tax levies for that purpose. In fact the question here involved was not discussed in that case at all. From the opinion it appears that:

> "Thus, we extract from the mass of matter contained in the voluminous transcript the single real issue, whether or not that certain sum was of a nature, and so held, as subject it to the process, which issue was determinable upon the following brief statement of practically undisputed evidence: * * * * * Without entering upon a discussion of this testimony, we think it is clear, and so hold, that the one acre fronting on the river, cut off from the rest by the railroad, was not held by the city for any governmental uses, and was no more than as private property held by an individual. It was subject to levy and sale under execution against the city."

That case, therefore, is worth nothing more than an authority upon the principle declared by Dillon that in the absence of statutory provision or legislative policy providing for the collection of a municipal judgment otherwise than by execution, and where there is private property subject to levy, a municipal judgment may be enforced by execution. As we have shown, just the opposite of those two conditions exist in this Territory, consequently it was a waste of time for the Oklahoma Supreme Court to cite that case to support its opinion in this case.

The last and final case on this point cited by the court is that of Holladay v. Frisbie, 15 Calif., 631. That case is based for its authority on this question entirely on the earlier case of Smith v. Morse, 2 Calif., 524, and it is strikingly apparent from an examination of what is said in the Holladay v. Frisbie case and the Smith v. Morse case that the California legis-

lation upon which those decisions are based are absolutely and in no wise or to any extent in the slightest similar to the Legislation of this Territory upon which this case must be disposed of.

In the Smith v. Morse case, which is an exhaustive opinion,, the litigation involved title to some property in San Francisco which it was determined was subject to the payment of the vast debts of the city, and which was transferred for the purpose of cheating and defrauding the creditors of the city. Concerning this purpose and the transaction the court in the opinion said:

> "To carry out these purposes, a deed was made to them. On the same day the debt of the city exceeded one million of dollars, more than three times its annual estimated revenue, and the plaintiff was at the same time one of its creditors.
>
> Had this been the transaction of a private individual, attempting to place his property beyond the reach of creditors, yet reserving the benefit of it to himself, empowering his assignees to create new liabilities upon his own account, and delaying his honest creditors from making their money, unless the Commissioners thought proper to sell, no lawyer would have attempted to uphold it, in any court of justice. How then does this transaction vary from that of private individuals?"

It is manifest that there is no such question of transfer of property with intent to defraud creditors in this case. The court found in that case, too, that the city of San Francisco had after this fraudulent transaction wholly withdrawn all of its property from the reach of the creditors in any way. There was no statute there which provided specifically, as the Oklahoma statute does, that there should be created a sinking or judgment fund into which should be placed the moneys derived from a specific annual levy for the payment of the judg-

ment debts against the city, and provision thus made for the payment of the creditors' obligations. It was found that the law was one which attempted to deprive the creditors of the city of San Francisco of all remedy for the collection of these vast debts, and concerning this the court said:

> "It needs no argument to prove that the law cannot be upheld which wholly withdraws the property from the reach of the creditor."

Concerning the character of this California legislation the court further said:

> "If an act, which gives to the mortgagors the right to redeem in twelve months, or provides that property shall not be sold for less than two-thirds of its value, or which exempts the necessary property of the poor and indigent, is unconstitutional, how much more so is an act which divests the creditor's lien altogether? Which exempts the property of the judgment debtor from execution, places it in the hands of trustees, with power to sell, as they may think proper, and compels the creditor, if he wishes any benefit whatever, to fund his script at a less rate of interest, and submit to the delay of twenty years, without any guaranty that he will then receive the principal. Such are the provisions of the act to fund the indebtedness of the city. The property out of which the creditor had a right to make his money, is attempted to be withdrawn and the remedy he possessed so far impaired, as to make his right worthless."

Now there is no question of that character here. We do not contend, nor is it contended on the other side that the city of Perry has attempted through legislative enactments to place its property beyond the reach of creditors, but we do claim, on the contrary, that the legislature has made ample provision whereby the city of Perry as a municipality of this Territory should meet its judgment obligations by the levy of a specific annual tax for the payment of these judgments,

and that these judgments shall be paid by that means, and that means only.

Furthermore, it appears in that California case that the statute of that state was construed to authorize the process which the clerk had issued, a *Venditioni Exponas* under which the sheriff had sold the property in question. The court said:

> "Statutes 1850, p. 24, which authorize the court to 'frame new writs and process, and to issue all such executions and other writs, as may be necessary to carry their judgments into full force and effect.'"

And in concluding the case the court said:

> "The plaintiff was an honest creditor of the city, and as such, entitled to be paid: if, in attempting to shuffle off this debt, the city has lost her patrimony the censure must fall on those who have permitted so great a sacrifice. This court cannot warp the stern rules of law, to relieve against the apparent hardship of the case, or to defeat rights properly and legally acquired."

A careful examination of this case of Smith v. Morse, the case on which that of Holladay v. Frisbie is based, it seems to us would have disclosed to the Supreme Court of Oklahoma the radical and striking differences between those decisions and this case, and that those California cases are not only no authority which would warrant the court in holding that an execution may issue to enforce a municipal judgment in face of an express statute which provides for the payment of the judgment by levy of taxes upon the property within the city instead of by sale of city property where the city possessed none, in fact or in law, which could be sold. And likewise, those cases are no authority for a decision which would permit the city of Perry to contract with its creditors for the payment of these judgments in their order of rendition out of the funds which

it was well known the law provided for the payment of such debts, and which funds the city was annually providing by making the maximum levy which could be made under those laws to provide such fund, and then when this contract had been followed for years by reason whereof there had been no payment upon any of these judgments, permit such city to plead the statute of limitation as a means of defeating entirely the already too long delayed satisfaction of these judgment demands. It would have been better, it seems to us, and more in keeping with the logic and effect of the decisions of the Supreme Court of California cited by the Oklahoma court for it to have said "this court cannot warp the stern rules of law" to relieve the city of Perry from the payment of its judgment debts.

Not only, then, we claim, has the Supreme Court of Oklahoma applied a rule and authorities which exists only in the absence of statute to a case where the territorial legislation clearly provides a contrary method, but as we claim, have applied the section relating to the dormancy of a judgment because of failure to issue execution to a character of liabilities where the law not only does not contemplate, but clearly by implication would prohibit the enforcement of the same by execution.

Section 4337 referred to is the only section under which it is claimed by the Oklahoma Supreme Court that it was necessary at all to revive these judgments to continue their binding effect as an enforceable municipal liability, and this section manifestly relates only to such as may be enforced by execution, because it is only upon the failure to sue out an execution within five years from the date of the judgment, or within five years from the date of the last execution, that the judgment becomes dormant; and since no municipal judgment of this Territory can be enforced by execution, and therefore

no execution is necessary thereon, this section manifestly does not apply to such judgments.

Furthermore, it is quite apparent that that section was never intended to apply in this Territory to municipal judgments, for it states that they "shall cease to operate as a lien on the estate of the judgment debtor," and judgments against cities in this Territory are not liens upon the "estate of judgment debtor" and could not be held to be liens upon anything but the tax levies and the tax moneys in the fund providing for their payment.

That that section of the code is not to be considered of universal application to all judgments is sustained by the decision in State ex rel Curtis v. Durien, 46 Kan. 695. In that case there was a judgment in perpetual injunction rendered on March 19, 1886. On April 1, 1891, an affidavit was filed charging that the defendant had violated that injunction. The defendant claimed that the judgment being more than five years old and there being no process thereon, had become dormant. The court in denying this contention, said:

> "Finally, it is suggested, rather than argued, that the decree of injunction is dormant and insufficient as a basis for a contempt proceeding, for the reason that more than five years have elapsed since its rendition. The provision of the code that a judgment shall become dormant and cease to operate as a lien upon the estate of the debtor when execution has not been taken out for a period of five years has no application to a judgment of this character. It was final and perpetual, and no execution was necessary to continue it in force. It perpetually enjoined the defendants from the commission of an offense, and created no lien on their estates, and did not come within either the letter or spirit of the statutory provision with reference to dormant judgments."

And so we claim here, that the section on which the city

of Perry and the Supreme Court of Oklahoma rely has no application whatever to a judgment of this character which cannot be enforced by execution and which cannot be a lien upon the estate of the judgment debtor, and that such judgments do not "COME WITHIN EITHER THE LETTER OR SPIRIT OF THE STATUTORY PROVISION WITH REFERENCE TO DORMANT JUDGMENTS." It is only for the purpose of permitting execution that the statute makes it necessary to revive a judgment, and such a revivor is certainly unnecessary when no execution can be issued on a judgment, or the judgment enforced thereby.

In the Ency. of Pleading & Practice, Vol. 18. 1058, the author says:

> "What judgments may be Revived.—In General.—It is a general rule that a judgment in order to be revived must be one on which execution could at some time have issued."

The author cites the case of Turner v. Dupree, 19 Ala., 198.

In the case of Amy v. the City of Galena, 7 Fed. 163, judgments were rendered against the city in 1866 for the sum of $25,000. Fifteen years after these judgments were rendered mandamus proceedings were brought to compel the city to make a levy of one per cent. per annum for the payment of principal and one per cent. per annum for the payment of the interest on these judgments. The return of the relator presented, by demurrer, similar objections to those presented by the defendant here, but the court in deciding the objections, overruled the respondent's contentions and made the order requiring the city to levy the tax in the amount that the law required to be levied for a single year. The court there held:

> "It is urged by respondent's attorney that, by analogy to the statute limiting the lien of judgments on

real estate to seven years, the right to enforce payment of a judgment from a municipal corporation, by compelling the levy and collection of a tax, cannot be enforced after the lapse of seven years; but I cannot concur in this position. The duty of a municipal corporation, to take the proper steps to raise means wherewith to pay judgments against them, is a continuing obligation which is not affected by the lien of the judgment on real estate, and is not in the least affected by the statute giving and limiting such lien; and, even if the lien of a judgment on real estate, from the time of its rendition, has lapsed the right to issue an execution and levy on any property subject to execution remains. See Stribling v. Prettyman, 57 Ill., 371.

This view of the law is also further supported by the principle that no execution can issue against a municipal corporation as was fully decided in the case of Chicago v. Halsey, 23 Ill., 595, and affirmed in Odell v. Schroeder, 58 Ill., 353, and 84 Ill., 294.

Showing, as these cases do, that no execution could issue against this municipal corporation, in the first instance, to enforce the collection of this indebtedness, the only remedy was to compel the levy and collection of the tax, or an order on the treasurer, if the money was already collected and in the treasury."

The syllabus of the case states:

"The duty of a municipal corporation to take the proper steps to raise means wherewith to pay judgments against it, is a continuing obligation, and is not subject to the statutory limitation of the lien of such judgments."

And on the point with reference to execution the court said:

"No execution can issue against a municipal corporation."

In the case of State v. Royse, (Nebr.) 91 N. W. 560, the court says, with reference to a judgment against the city of Broken Bow, in that state:

> "Execution cannot issue upon such a judgment for its collection, and mandamus against the taxing power of the municipality is the only remedy when payment is denied."

In an earlier case in Nebraska, that of Alter v. The State, 86 N. W., 108[illegible] appears a decision which, even though it were held that it would have been appropriate to have had execution issued against the city of Perry, holds that the levy of a tax by a municipality to pay the judgment is equivalent to the issue of an execution on the judgment. There the court said:

> "WHERE THE PROPER OFFICERS PROCEEDED AND LEVIED A TAX, AS THEIR DUTY WOULD REQUIRE THEM TO DO, THERE MAY BE REASON TO SUPPOSE THAT SUCH LEVY WILL TAKE THE PLACE OF THE LEVY OF AN EXECUTION, INCLUDING THE ISSUING AND DELIVERY OF THE SAME UPON ORDINARY JUDGMENTS, AND, IF SO, IT WOULD FOLLOW THAT WHERE THE PROPER AUTHORITIES LEVY THE NECESSARY TAX FOR THE PURPOSE OF PAYING A JUDGMENT AGAINST A MUNICIPAL CORPORATION, AND THE SAME IS COLLECTED AND ACTUALLY PAID UPON THE JUDGMENT, THIS WOULD BE EQUIVALENT TO THE ISSUING OF AN EXECUTION UPON AN ORDINARY JUDGMENT."

Now the three points decided by the United States Circuit Court in the Amy v. City of Galena case are absolutely applicable here. First: No execution can issue on these judgments against the city of Perry; Second: It is the duty of the city of Perry, by express statute, to make an annual levy for the payment of all judgments against said city not exceed-

ing five mills on the dollar of the taxable property of said city; Third: It being a continuing obligation on the part of the city to make said levy, the statute of limitation can not apply.

III.

OKLAHOMA LAW PROVIDES FOR COLLECTING JUDGMENTS BY TAX INSTEAD OF EXECUTION.

That it is and has been throughout the life of all these judgments the duty of the city of Perry to make a levy of five mills on the dollar to provide a fund with which to pay these judgments is clearly declared by our statute. Section 1 of Article 5, page 83, of the Statutes of 1897, provides:

> "Section 1. That the mayor and council of cities of the first class, shall, on the second Monday in July of each year, make the following general tax levies only, and at the following rates, upon all the taxable property of the city * * * Sixth, for a sinking fund, a levy sufficient to pay one year's interest on the bonded debt of the city, and to pay all bonds as they fall due, with twenty-five per cent. added as an allowance for delinquent taxes, and an additional amount sufficient to pay one third of the original amount of all outstanding judgments against the city: Provided, That as much as one-third of the original amount remains unpaid. If less than one-third of such judgment remains unpaid, then a sufficient levy shall be made to pay the remaining judgment: Provided, That the entire sinking fund shall not exceed five mills * * *."

That statute was amended by the legislature of 1899, and as amended appears in Section 1 of Chapter 8, page 103 of the Session Laws of 1899, in the following language:

> "Section 1. That the Mayor and Council of the cities of the first class shall, on the second Monday in July of each year, make the following general tax levies only, and at the following rates upon all the

WRITING CLOSE TO E

taxable property of the city: *** (8) For a judgment fund, not to exceed five mills, sufficient to pay one-third of the original amount of such judgments: Provided, as much as one third of the original amount of such judgment remains unpaid. * * *"

And that section is embodied and annotated in Wilson's Statutes of 1903, as Section 466, so that it is now and has been during the life of all of these judgments against the city of Perry the positive duty of said city to make a levy each year for a judgment fund with which to pay these judgments, of not exceeding five mills, and it appears by the allegations in the alternative writ of mandamus that these levies have been made, and some money in the hands of the City Treasurer as a part of the fund created by the city for the payment of these very judgments.

The Oklahoma legislation thus not only by its terms, but by the construction which the authorities of the city of Perry placed upon it and the effect which it gave to it down to the year 1905, clearly provided a method for the payment of these judgments, and it is useless, it seems to us to talk about the necessity of issuing executions to pay such judgments when the legislature has squarely and specifically declared that they shall be paid in another way by the levy of taxes; and the city of Perry down to the time it began the dispute which resulted in this case, was proceeding to carry out the statutory method to meet these judgments.

This statute should be construed, we claim, as a prohibition against the issuing of an execution, because the legislature has provided how these judgments shall be enforced, and this method does not include the issuance of an execution. Consequently the authorities cited in Beadles v. Fry are not applicable in Oklahoma.

This theory of the law was recognized by the city of Perry as appears by the alternative writ, because each year down to

and including the year 1905 it made the full quota of levy which it was authorized under the law to make for the payment of judgments, and consequently no execution in the way of mandamus could have been during that time issued against the city of Perry, and consequently the statute of limitation could not, during that time, run against these judgments, and in favor of the city of Perry.

The whole fabric of the decision of the Supreme Court of Oklahoma that these judgments have become dormant because no execution was issued, is based upon the theory that execution might have issued, and thus it was necessary to issue execution in order to prevent dormancy. But as authority upon the proposition that an execution may not ordinarily be issued upon a municipal judgment, we refer the court to Dillon on Municipal Corporations, Section 100, and on the point that the sole purpose of a revivor of a judgment is that an execution may issue upon it, we refer the court to Eaton v. Hasty, 6 Nebr., 419; Irwin v. Nixon's Heirs, 11 Pa. St., 425; Rice v. Moore, 48 Kan., 590; Freeman on Executions, Section 81; Bankers Life Insurance Co. v. Robbins (Nebr.) 80 N. W., 484; Brockway v. Oswego Township, 40 Fed., 612.

The city of Perry cannot thus successfully plead the statute of limitation as a defense against the validity of these judgments, and maintain that they are invalid because no execution was issued, when the city of Perry has all these years recognized them as valid and put and kept in motion the machinery of the law providing for their execution. They certainly could not be held to have become dormant or barred by limitation until five years, or the statutory period had expired, from the time when the city had recognized them as valid and subsisting judgments and had refused to recognize them as valid and subsisting judgments, which, we aver, was done first in the year 1905, less than one year before this suit was begun to com-

pel the recognition of the validity of these judgments and the payment thereof in their due course.

The Oklahoma Supreme Court in the Beadles v. Fry case, cited a number of cases to support its conclusion that the judgment creditors of the city of Perry having failed to issue execution within five years from the date of the respective judgments, and not having revived the judgments within one year after they became dormant, the judgments must each be held to have become barred by the statute of limitation. We will review these cases and show their inapplication to this case.

The case of Newton v. Arthur, (Kan.) 55 Pac., 446, was an application to revive a judgment in a case between private individuals and not one in which the municipality was a judgment debtor like the case at bar. Notice was given within the year but no order of revivor was made within the time required by law, and it was simply held that it was not error then to refuse to make the order of revivor.

Israel v. Nichols, (Kan.) 14 Pac., 438, simply holds a statute for revivor of judgments applies to judgments of Justices of the Peace which have not been transferred to the District Court by appeal or otherwise.

Brockway v. Oswego Township, (Kan.) 4 Pac., 79, holds that although the township has failed to elect officers, or they have failed to qualify and there are no officers at all of the township to be found, service of notice to revive a judgment cannot be had by publication, as this would not constitute a concealing of itself by the township so as to permit service by publication.

It is very worthy of note that the very able counsel for the creditor in that case, a firm of lawyers containing men who for a quarter of a century had been leaders in the legal profession in Kansas, and especially in this line of practice, in

their desperation to keep alive this judgment for collection never thought of so easy a method as that which the Oklahoma court now proposes as one which, if followed, would still keep these judgments valid, that is, the simple process of issuing an execution; and also that the able counsel on the other side of the case who wished to defeat the collection of this judgment never once dreamed that their scheme to defeat the judgment by causing a vacancy in the township offices could be overcome by the very easy process of issuing execution thereon.

The case of Baker v. Hummer, (Kan.) 2 Pac., 808, holds only:

> "An action can be maintained on a dormant domestic judgment in this state if commenced within one year after the judgment is dormant."

Angell v. Martin, 24 Kan., 33, the last case on this point, holds:

> "A dormant judgment cannot be revived without the consent of the defendant unless such revivor is applied for within one year after the same has become dormant."

This review, it seems to us, is sufficient to show this court that those are authorities upon the general application of this Section 4337 of the statutes of Oklahoma of 1893 which we claim has no application to this controversy.

There are several cases in which courts have held under this statute or a similar statute that the necessity for a revivor of dormant judgments extends to judgments against municipalities, but an examination of those cases will show two things: First, that these decisions were not made where there were statutes like ours which expressly command the municipality to make annual levies of a specific amount to create a fund out of which to pay the particular judgment or judgments, as our statute does. And, Second, that there are many things which intervene to suspend the operation of the dormancy statute.

IV.

STATUTES OF LIMITATION DO NOT RUN AGAINST MUNICIPAL OBLIGATIONS OF THE CHARACTER OF JUDGMENTS IN OKLAHOMA.

The Supreme Court of Oklahoma Territory had before this litigation arose, taken a positive and decided stand against the plea of the statute of limitation upon municipal debts. The case of Barnes v. Turner, 14 Ok. 20, decided September, 1905, and affirmed by this court in the judgment of Duke, Mayor, et al., v. Turner, 204 U. S. 605, is one of these cases. There warrants had been issued by the subdivisions of the city of Guthrie under a statute which made it the duty of the city to levy annually taxes on such subdivisions for the payment of said warrants. The city failed to make the levies and failed to create the fund, and *Twelve* or *Thirteen* years afterwards declined, when requested, to make the levy, on the ground that the claims had been barred by the statute of limitation. The Supreme Court of Oklahoma in deciding the case said:

> "Inasmuch as, under the law, it was the duty of the mayor and council of the city of Guthrie to levy a tax, it is wholly immaterial, it seems to us, whether the duty arises by reason of a contractual obligation or by reason of a statute. In either case, the duty is the same."

In quoting from the case of Freehill v. Porter, (Calif.) 4 Pac., 646, the court said:

> "By law it was the duty of the city to make provision, for the payment of the bonds and coupons, according to the statute under which they were issued, and by omitting to perform such duty the city could not create the defense of the statute of limitations.

> Not until the funds were in the treasury, properly applicable, would the statute begin to run. Not until that period would the petitioner have the right of action or proceeding against the treasurer."

The court also quoted the following from the case of Lincoln County v. Luning, 133 U. S., 529:

> "When payment is provided for out of a particular fund, to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided."

And, following these cases, and having taken a stand on that side of this plea which prevents municipalities from using their own failure to perform their duty and its continual failure for the lapse of years, as a defense to meeting these obligations, that court took the following high stand:

> "This language, it seems to us, is especially applicable to the case under consideration. The Legislature of the Territory of Oklahoma provided how the indebtedness of the old provisional government of the city of Guthrie should be determined and liquidated, and in the act provides that the present city of Guthrie should through its municipal officers, levy taxes upon the different subdivisions which have created the obligations, and that such levies, so made, should create funds for the payment of the debts so created. This, it is admitted, the officers of the defendant city of Guthrie have failed entirely to do, and now they seek to interpose their negligence as a defense, and to do this under the name of the statute of limitations. It would seem unnecessary to further cite authorities after the decided and emphatic manner in which our own Supreme Court in the Greer county case has decided this question. It would seem to us that this decision ought to settle the law upon this point in this territory."

That case is absolutely in point in this case. There the

warrants were issued upon an adjudication of indebtedness made by a board of referees created by law and appointed by the District Court, and there as here, it was made the plain duty to meet these obligations by the annual levy of taxes, which were not to exceed five mills on the dollar, and here those taxes have been levied up to the year 1905 and the city treasurer has a part of that fund still in his hands for the payment of these judgments.

The alternative writ of mandamus in this case shows that these judgments that are now owned by Mr. Beadles and held against the city of Perry were upon warrant obligations of said city. (Pages 24-25.)

The placing of these obligations into judgments, which are to be paid out of the judgment fund of the city, does not in any way affect the principle applied in the Barnes or Duke Mayor v. Turner case.

In the case of State v. Royse, supra, the nature of a judgment as an obligation of the city is clearly defined in the following language:

> "A judgment against a city or county is but an audited demand against such municipality, which is no longer open to contest."

That doctrine declared in that case is supported by the decisions of this court therein cited.

In the case of United States v. County of Macon, 99 U. S. 582, it is said:

> "We have not been referred to any statute which gives a judgment creditor any right to a levy of taxes which he did not have before the judgment. The judgment has the effect of a judical determination of the validity of his demand and of the amount that is due, but it gives him no new rights in respect to the means of payment."

See also on this point Wisconsin v. Pelican Insurance Co. 127 U. S., 265.

In the case of Atchison, Topeka & Santa Fe Railway Co., v. The Territory of New Mexico, 72 Pac., 14, the Supreme Court of that Territory held that the debtor's claim was the same after judgment as before.

And so we claim that if the statute of limitation could not run against the warrants held by the creditors of the city of Perry before they were merged into judgments, as the Supreme Court of Oklahoma had clearly established the law to be in the Barnes, Mayor, v Turner case before this case arose, then the statute of limitation should not be held to run on such demands after they were merged into judgments.

In the case of State v. Royse, supra, it appears that the judgments were more than five years old when the mandamus proceedings were begun to compel a levy of a tax to pay the judgments. But it appeared also that some third party, not the defendant or other party to the case, had obtained an injunction to prevent the enforcement of these judgments, and deducting the time the injunction was in force, five years had not intervened from the date of the judgments to the time the mandamus proceedings were begun, and the court, although indicating without particular discussion on that point that the dormancy of the statute would apply to such a judgment the same as to a judgment between private individuals, said:

> "* * but we do hold that the injunction granted in that case, and continued in force for nearly four years, operated as a suspension of the running of the statute of limitation, although the application for mandamus was made more than five years from the dates of these judgments, the relator is nevertheless entitled to deduct from this period of limitation the time during which he was enjoined, and because, after the allowing of this deduction, less than five years ap-

> pears to have elapsed from the rendition of the earliest judgment to the beginning of this action, we hold that none of these judgments are dormant."

We thus see one thing which suspends the operation of the dormancy statute, even if it may be applied to city judgments. In the case at bar the dormancy statute could not have run because the city had all the time recognized these as valid judgments and had been levying taxes for the payment of these judgments, and certainly no judgment can become dormant while it is being paid. Part payment is always sufficient to take a case or demand out of the operation of a statute of limitation, or dormancy, and the recognition of a judgment as a valid and binding obligation is likewise sufficient.

In the case of Darcy v. Mumpford, 58 Ga., 119, the dormancy of the judgment was claimed. It appeared that one execution had been issued on the judgment and that the defendant had entered into a written agreement with plaintiff's attorney, which was entered on the execution and signed by the parties as follows:

> "It is agreed between the parties that upon the payment of $100 on or before the 1st day of January next and $100 on or before the 1st day of January, 1875, this *fi fa* and the judgment upon which it is issued, shall be considered as settled, paid off and discharged."

It appeared in the case that the defendant failed to pay the money as agreed upon. The court held:

> "As between the parties themselves that agreement entered on the execution and signed by them was such a recognition of the validity of the execution as would prevent it from being considered as dormant by the court. If the parties, plaintiff and defendant recognized the execution as a valid subsisting execution on the second day of December, 1873, surely the court ought to have done so."

Now in the case at bar the city of Perry not only has been levying taxes each year for the payment of these judgments, but has, as we have seen, ratified and approved contracts that were made between the judgment creditors for the payment of the outstanding judgments against the city of Perry in their order of rendition, and on the 3rd, day of December, 1901, upon the presentation of waivers by the plaintiffs to the judgments which our client holds, the city approved such agreements and directed the City Treasurer to pay those judgments out of the funds then, or thereafter to come, into his hands and which should accrue in the judgment fund. That agreement would certainly in itself keep those judgments alive for a period of five years. Not only would it do this, but it would be sufficient in itself to keep those judgments alive until the city, in the compliance with its additional duty under the statute to levy taxes annually, should provide a fund with which to pay those judgments.

In the case of United States ex rel Field v. Township of Oswego, Labette County, Kan. 28 Fed. 55, Judge Brewer, upon the U. S. Circuit Court, held that the judgment against the township had become dormant. He stated:

> "It is settled in this state, both by statute and decisions, that a judgment becomes dormant in five years, and that an execution issued thereafter is absolutely void. It is true that the statute provides that no execution shall issue against a county, but the proceeding by mandamus is one in the nature of an execution for enforcing the collection of judgments against a municipality. I think, by all fair analogies, the same rule applies: and if a party holding a judgment against a municipality permits it to stand, without any effort to collect it by mandamus proceedings, for five years, the judgment becomes dormant, and there must be a revivor, which can only be had within a year, before any process can be obtained on that

> judgment. I cannot think it possible that the legislature, by taking away the right to issue execution against the county, meant that a judgment against a county should remain in force indefinitely. It has provided that the judgment should be paid by taxes, and the taxes enforced by mandamus. The mandamus is the equivalent of an execution, and the same rule must obtain as to all judgments which are permitted to stand for five years without process. They become dormant."

No Kansas Supreme Court decision is cited in support of the holding in that case as applied to a judgment against a municipality. But that case is not applicable here, for the reason that there was no law in that state making it the duty of the municipality to levy taxes annually for the creation of a judgment fund out of which to pay the municipality's judgments. Here we have a law which requires the levy of taxes for this judgment fund, and that law, as the writ alleges, has been strictly enforced every year by the city of Perry by its making a levy of the taxes to the full amount provided by law to create this judgment fund.

The case above cited is directly in our favor in this: that it is held there that mandamus is in the nature of an execution for enforcing a judgment, and that the parties could have kept the judgment alive in that particular case by resorting to mandamus. Now it being true that a judgment can be kept alive by a resort to a mandamus to compel the levy of a tax, then we claim that a judgment can be equally kept alive by the city's making all the levy which mandamus would have compelled it to make. Certainly if a statute of limitation will not run on a judgment where mandamus is had to compel the levy of a tax, then the statute cannot run against the same judgment where the municipality, without the mandamus, makes the particular levy for the payment of the tax to create this judgment fund. And that is the position we are in with refer-

ence to the judgments of the city of Perry. The city has, without the mandamus, in addition to the contract which it made with the judgment creditors less than five years before this suit was begun and in December, 1901, proceeded each year since then up to 1905 to make a levy of the largest amount which it could make under the statute, to create the judgment fund out of which to pay, and out of which it has regularly paid, outstanding judgments against the city of Perry, and these payments continued until they reached the judgments owned by this plaintiff which are next in order.

We could not have had mandamus to compel the city of Perry to levy a tax to pay these judgments, because it was annually levying all the tax, five mills per year, which it had any power or authority to levy under the statutes of this territory.

The case of State v. Royse, supra, is in point again in that it supports this contention. The case on that point says:

> "We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation. In this case it appears that the special tax of one-twentieth of one per cent. has been regularly levied, collected, and applied, and no complaint is made as to the levy of one-half of one per cent. for general purposes. What is wanted is the levy beyond these amounts; and that, we think, under existing laws, we have no power to order."

That case cites the case of U. S. v. Macon County Court, 99 U. S., 592, where the court said:

> "We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation."

WRITING CLOSE T

So that in the case at bar the city of Perry continued to do without compulsory process all that it could have been compelled to do by the compulsory process of mandamus, and certainly these acts on the part of the city kept these judgments as much alive as could have been done by mandamus. Indeed, we could have had no resort to mandamus because the plea would have been presented as in the Nebraska case and the United States Supreme Court case, that the city was already proceeding to pay these judgments as fast as it had any power or authority to pay them, and was proceeding to make all the levy which the law authorized or permitted, and we would have been defeated in such mandamus proceeding. But this would have been none the less a full recognition of these judgments and the action of the city in making these levies itself and observing the contract made between the city and the creditors for the payment of these judgments in their order of rendition, recognized and kept such judgments alive as fully as could have been done by mandamus if the city had failed to do its duty, as it did not do.

It would certainly be illogical and unreasonable to hold that judgments that are being recognized by payment or by other acts of the debtor giving them full force and recognition, are not as fully binding as judgments which had received only some other formal act of less effect in recognition or payment of the judgment.

For instance, suppose that A has a judgment against B. B makes no payment, and A, within five years from date of the judgment, issues an execution which is returned entirely unsatisfied. That execution keeps the judgment alive for another period of five years, according to the Oklahoma Supreme Court.

At the same time C has a judgment against D. C issues no execution, but within the five years period, without execution, D makes payment of a part of the judgment.

EDGE

Again: A, within the five year period, issues an execution against B and enforces the payment of a part of his judgment.

Now, are not these judgments all equally in force for the five year period from the date of the execution thereof, or payment of part of the judgment? To hold otherwise would be to give effect to form rather than substance. Without question A's judgments are both equally in force against B, although in one case he got something by his execution, while in the other case he got nothing. Now why is not C's judgment as fully in force against D? He effected more without execution than A did in one instance against B, and fully as much as A did in the other.

Again, the very term "revive" means to renew, or to give life to something that is about to die. Anderson's Law Dictionary defines the term as follows:

> "Revive. To impart new life to, renew; to make operative once more; to restore original force to: as, to revive a debt, a suit, a judgment.
>
> Revival; reviver; revivor. The act or proceeding of giving new life or efficacy to that which has lain dormant, been abated, or has or will become outlawed."

Now it could hardly be said that it ever was necessary to impart new life to or to revive these judgments that the city of Perry has constantly recognized by the levying of annual taxes to pay the same, and under which levy the City Treasurer, as we allege, now has more than $2200, in his hands in the judgment fund and with which to pay these judgments, and it could hardly be said that these judgments have lain dormant for more than five years when the city of Perry has within five years before this suit was begun expressly directed the City Treasurer to recognize the agreements among the creditors to pay these very judgments in their order of rendition, and directed the City Treasurer to so pay the same. In any event

there could be no necessity for the revivor of these judgments until after five years from December 3, 1901, by mandamus or otherwise.

So, too, in the case at bar. The city has not only, by its express agreement with the judgment creditors, estopped itself from claiming the dormancy of these judgments, if they ever could have become dormant, but it has proceeded throughout all the years of their existence to make all of the levy which an execution, in the nature of a mandamus, as the courts put it, could have enforced.

In the case of Brockway v. Township of Oswego, 40 Fed., 612, Judge Foster in the United States Circuit Court of Kansas, followed the decision of Judge Brewer in the Oswego case in the 58 Fed. although saying:

> "With these views of my Brother Brewer this point may rest, although much might, perhaps, be said on the other side of the question. Amy v. City of Galena, 7 Fed, rep. 163. It must, however, logically follow that, if judgments against municipalities and against individuals alike come under the rule of this statute, a failure to issue a mandamus for five years has the same effect as a failure to issue an execution; i. e., the judgment simply becomes dormant."

And the court then proceeded to hold that the judgment did not become dormant because there had been a period when the statute was suspended by there being no officers of the township.

The Court said:

> "It is true, the township of Oswego had not absconded, nor been absent or concealed; but all of its officers on whom any notice or process could be served were absent, absconded, or concealed during the whole of said period of time, and that with the express purpose of baffling and defeating the creditor in his attempts to revive his judgment. If it had been an or-

> dinary case of vacancy in office, it might be urged that the creditor should have applied to the board of county commissioners to have the vacancies filled under chapter 110, Gen. St. sec. 12; but in this case it would have been an idle and useless thing to do. The people of the township were united in their determination to defeat the judgments against it; and, even if the board of county commissioners should have named persons to fill the offices in said township, they could not have compelled them to qualify or serve. It seems to be a case somewhat analogous to a judgment debtor who conceals himself or absconds to prevent service of process; and I have no hesitation in saying that the action of the people of the defendant township, by keeping the offices vacant and thus preventing service of process, did not bar the judgment creditor from maintaining his action after the vacancies were filled. I have been unable to find a case exactly in point, but there are many cases holding that the existence of war suspends the statute of limitation as between citizens of the contending states."

So there is another case in which the court held that the alleged dormancy of a judgment was suspended. And thus it will be seen that even though the court might hold that ordinarily the rule of dormancy might apply to a municipal judgment, there are instances, several of which we have here given from authorities, in which the judgment does not become dormant.

V.

THE CITY OF PERRY RECOGNIZED THESE JUDGMENTS AS VALID JUDGMENTS AND CONTINUED TO LEVY TAXES TO PROVIDE MONEY IN THE JUDGMENT FUND TO PAY THESE JUDGMENTS, AND MANDAMUS, WHICH IS THE ONLY EXECUTION

AGAINST A MUNICIPALITY, COULD NOT HAVE ISSUED UNTIL THE CITY REFUSED TO RECOGNIZE AND PAY THE JUDGMENTS IN 1905.

In the case of Field v. Township of Oswego, 28 Fed., 55, Judge Brewer held:

"Mandamus is the equivalent of an execution."

But mandamus will not lie when a party is doing a thing which he might by mandamus be compelled to do. It appears in the alternative writ that the city of Perry was recognizing these judgments as valid judgments down to the year 1905, and levied each year the full amount of levy which it could make for the judgment fund to pay these judgments. Consequently that process which the courts hold is and constitutes an execution against a municipality, that is, a writ of mandamus, could not issue while the city of Perry was doing toward these judgments all that it could have been compelled by mandamus to do, and of course the statute of limitation could not run, and these judgments could not become dormant during such time.

The very term "revive" means to impart new life to; to renew. Anderson's Law Dictionary defines the term as follows:

> "Revive. To impart new life to, renew; to make operative once more; to restore original force to, as to revive a debt, a suit, a judgment."

These judgments, it appears by the writ of mandamus, were recognized as valid by the city of Perry, and taxes levied therefor and applied to the payment of the judgments against the judgment fund of the city of Perry in their order of rendition, under the contract between the judgment creditors and the city down to the year 1905; consequently there could have been no dormancy whatever of the judgments during that time, and the statute of limitation could only have begun to run

from the time the city of Perry declined to recognize these judgments as valid, and to observe the law requiring the levy of taxes for the payment of these judgments, and to observe the rights of the judgment creditors with reference thereto.

In Alter v. State, (Nebr.) 86 N. W. 1080, the Supreme Court of that state said:

> "It might be considered that the levy of the tax would correspond to the levy of the writ on judgments against individuals, but, while no levy can be had under ordinary judgments without the formal issuing and delivery of the execution, this is not true in the case of judgments against municipal corporations; and in such a case, where the proper officers proceeded and levied the tax, as their duty would require them to do, there may be reasons to suppose that such levy will take the place of the levy of an execution, including the issuing and delivery of the same upon ordinary judgments, and, if so, it would follow that where the proper authorities levy the necessary tax for the purpose of paying a judgment against a municipal corporation, and the same is collected and actually paid upon the judgment, this would be equivalent to the issuing of an execution upon an ordinary judgment, within the meaning of Section 482."

Under our legislation a judgment fund has been created. This judgment fund is provided for the payment of debts of the municipality which have been merged into judgments. It is immaterial then, under the Nebraska authority, whether payment has been made upon any of these judgments of Mr. Beadles, so long as the judgments are recognized as valid, and taxes are levied for the purpose of paying these judgments, and are applied each year to the judgments pro rata, or are applied under agreement made with the creditors and the city, to the judgments in their order of rendition. This case should be held to come under the Nebraska decision, which holds that the levy of a tax takes the place of the levy of an execution,

and prevents the dormancy of the judgment. This is the fair and logical conclusion of law which should be applied in this instance.

VI.

MANDAMUS APPROPRIATE REMEDY.

Under the answer in this case we hardly deem it necessary to discuss the question of the appropriate remedy in such cases, as the only defense made is that these judgments have become dormant. If that question, however, should be raised in this court, we cite the court to the case of Turner & Kirkwood v. the city of Guthrie, 13 Okla. 26, 204 U. S. 623; Fitzhugh v. Ashworth, (Calif.) 51 Pac. 635; Ward v. Piper, (Kan.) 17 Pac. 699; Knox County v. United States, 109 U. S. 229; United States v. Brown, County Treasurer, 41 Fed. 471; Abernathy v. Town of Medical Lake, (Wash.) 37 Pac. 306; Ralls County Court v. United States, 105 U. S. 733; McCowan v. County Treasurer, (Calif.) 40 Pac. 231.

VII.

CITY'S AGREEMENT TO PAY THESE JUDGMENTS IN THE ORDER OF RENDITION WAIVED REVIVOR.

It appears from the alternative writ of mandamus that on Dec. 3, 1903, the city of Perry passed a resolution ratifying and approving the agreement of the judgment creditors of the city of Perry that the then existing judgments, including all those which this plaintiff now holds, should be paid by the city Treasurer in their order of rendition. This agreement recognized these judgments as valid and subsisting judgments, and the city ought not to be permitted by the court to claim, within five years from the date of his agreement and resolution, that

these judgments had become dormant. That agreement was equivalent to a written agreement made between the city and its creditors that these then subsisting judgments should be paid, and it should be held as equivalent to a revivor of these judgments, even if they were judgments that could become dormant under the law, which we claim they could not; and we should be entitled to our execution by mandamus, which is the only execution, as we have seen, that is warranted against a municipality under the law at any time within five years from the date the city declined to recognize and ceased to follow and enforce this agreement. The city of Perry having ratified and approved this agreement among the judgment creditors to pay these judgments in their order of rendition, and having carried out this agreement in the levy of taxes and the payment out of the judgment fund of these tax moneys for all these years, should now be held to be estopped from pleading the dormancy of these judgments even if otherwise they could have become dormant.

Upon the record submitted and for these reasons we respectfully contend that the Supreme Court of Oklahoma erred in affirming the judgment of the District Court of Noble County, Oklahoma Territory, denying the peremptory writ of mandamus, and we ask that this judgment be reversed and the cause remanded with directions to the Oklahoma courts to issue a peremptory writ of mandamus as prayed for.

Very Respectfully Submitted.

S. H. HARRIS
FRANK DALE and
A. G. C. BIERER,
Attorneys for Plaintiff in Error and Appellant.

IN THE

Supreme Court

OF

The United States

OCTOBER TERM

J. B. BEADLES,
Plaintiff in Error and Appellant
vs.
A. E. SMYSER, Mayor
G. R. BEYERS, et al, City Councilmen, and
W. R. FRY, City Treasurer of the City of Perry, Noble County, Oklahoma Territory,
Defendants in Error and Appellees

No. 1[illegible]

BRIEF OF APPELLEES AND DEFENDANTS IN ERROR

A. N. WHITESIDE,
Attorney for Appellees and Defendants in Error.
H. B. MARTIN, of Counsel.

PERRY REPUBLICAN PRINT, PERRY, OKLA.

IN THE

Supreme Court

OF

The United States

OCTOBER TERM

J. B. BEADLES,
Plaintiff in Error and Appellant
vs.
A. E. SMYSER, Mayor
G. R. BEYERS, et al, City Councilmen, and
W. R. FRY, City Treasurer of the City of Perry, Noble County, Oklahoma Territory,
Defendants in Error and Appellee

No. 482

Writ of Error and Appeal from the Supreme Court of Oklahoma Territory

---

STATEMENT

We are content with the statement of facts made in the brief of plaintiff in error, except for the purpose of greater clearness, we desire to

point out that the alternative writ of mandamus recites that at the time of the prosecution of this action there was in the hands of the City Treasurer of the City of Perry, the sum $2,228.96, of money held in the judgment fund of said City for the payment of judgments existing against it, which said sum of money had accumulated in the City Treasurer's hands from annual tax levies of five mills, upon the taxable property in said City, according to the assessed valuation thereof; that such levy was the maximum levy permitted by the laws of Oklahoma for such purpose, and had been made every year up to the time of the commencement of this action. (Brief of plaintiff in error, pages 5 and 6.) And that the plaintiff in error held judgments against the City of Perry at the time aggregating more than $16,000.00.

ARGUMENT

1. THIS COURT HAS NO JURISDICTION OF THIS ACTION, BECAUSE THE AMOUNT INVOLVED IS LESS THAN $5,000.00.

This action is prosecuted in mandamus against the Mayor and Councilman of the City of Perry, to compel them to recognize the validity of plaintiff's judgments, and against the Treasurer of the City of Perry to compel him to pay out upon said judgments the amount of money in his hands, held in the judgment fund of said City in the sum of $2,228.96. If plaintiff's judgments were valid his cause of action in mandamus against the Treasurer of the City of Perry would be complete upon the refusal of the Treasurer to pay to the plaintiff upon demand the funds in the hands of said Treasurer applicable to the payment of said judgments. This cause of action in our judgments can involve no more than the amount of the funds in the hands of the Treasurer.

If the Mayor and Councilmen of said city had refused to exercise their full power to levy taxes for the payment of plaintiff's judgments, if such judgments were valid, plaintiff's cause of action in mandamus against the Mayor and Councilmen would have accrued, but the alternative writ of mandamus recites no neglect, default, or refusal on the part of the taxing officers of said City to levy a tax, but on the other hand

the writ shows upon its face that the Mayor and Councilmen had exhausted their legal power to levy a tax by making an annual levy of five mills, the maximum rate permitted by law. No cause of action, then, has accrued against the Mayor and Councilmen unless the recital in the alternative writ that they have refused to recognize plaintiff's judgments as valid, shows a breach of duty of said officers to the prejudice of plaintiff in error.

There is no duty imposed by law upon the the Mayor and Councilman of a City to recognize any judgments, except to exert the taxing power reposed in them to create a fund out of which judgments can be paid by the Treasurer of the City in the manner and form provided by law. The opinion of the Mayor and Councilmen as to the validity of the judgments, whether such opinion be expressed or reserved, affords no ground for a writ of mandamus. This appears fromthe recitals of the alternative writ to be the only wrong complained of as against the Mayor and Councilmen.

We submit, that if the validity of plaintiff's judgments were conceded, the only cause of action appearing upon the face of the alternative

writ is against W. R. Fry, Treasurer of the City of Perry, and that said cause of action can not involve more than the amount of money in the hands of the Treasurer, which is less than the amount necessary to give this court jurisdic- of the subject matter of the action.

It is conceded by counsel for plaintiff in error and appellant on pages 43 and 44 of their brief that no cause of action exists in the favor of Mr. Beadles to compel the City of Perry to levy any tax to pay their judgments. Counsel say in their brief:—

> "The city has, without the mandamus, in addition to the contract which it made with the judgment creditors less than five years before this suit was begun and in December, 1901, proceeded each year since then up to 1905 to make a levy of the largest amount which it could make under the statute, to create the judgment fund out of which to pay, and out of which it has regularly paid, outstanding judgments against the City of Perry, and these payments continued until they reached the judgments owned by this plaintiff which are next in order. We could not have had mandamus to compel the City of Perry to levy a tax to pay these judgments, because it was annually levying all the tax, five mills per year,

which it had any power or authority to levy under the statutes of this territory."

It having been thus conceded that the alternative writ states no cause of action in mandamus to compel the Mayor and Councilmen to levy a tax for the payment of the judgments described, what cause of action against them can be supposed to exist?

The statutes of Oklahoma relating to the levy of taxes provide among other things:—

> "That the Mayor and Council of Cities of the first class, shall on the second Monday of July each year make the following general tax levies only; * * * * * * for a judgment fund not to exceed five mills sufficent to pay one-third of the original amount of all judgments; provided as much as one-third of the original amount of such judgments remain unpaid; if less than one-third of such judgments remain unpaid, then a sufficient levy shall be made to pay the remaining judgments."

Other statutes of Oklahoma provide substantially that after the tax is levied the same is certified to the County Clerk of the County in which such city is situated, and is by him entered upon the tax rolls and collected by the County Treasurer as other taxes. That the

County Treasurer after having collected such, pays the same over to the City Treasurer, after which it becomes his duty to disburse the sum so created in payment of judgments in the manner provided by law.

The Mayor and Councilmen after they have made the tax levy have no further official duty in the premises. They have no power nor right to direct the City Treasurer as to the disbursement of this fund, and the record in this case does not show any attempt on their part to do so. If there were, or could be any effective interference by the Mayor and Councilmen with the performance of the duties of the City Treasurer, on his part, the remedy would not be mandamus but injunction.

II. A JUDGMENT AGAINST A CITY OF THE FIRST CLASS UNDER THE STATUTES OF OKLAHOMA BECOMES DORMANT AFTER FIVE YEARS FROM THE DATE OF ITS RENDITION IF EXECUTION SHALL NOT BE SUED OUT WITHIN THAT TIME AND SUCH JUDGMENT CAN NOT BE REVIVED WITHOUT THE CONSENT OF THE JUDGMENT

DEBTOR UNLESS IT BE REVIVED WITHIN ONE YEAR FROM THE TIME IT BECOMES DORMANT.

Section 4337, statutes of Oklahoma, 1893 provides;—

> "If execution shall not be sued out within five years from the date of any judgment that now is, or may hereafter be rendered in any court of record in this Territory, or if five years shall have intervened between the date of the last execution issued on such judgment, and the time of suing out another writ of excution thereto such judgment shall become dormant."

Other statutes exempt counties and school districts from execution, but there is no statute expressly exempting cities of the first class from executions upon judgments rendered against them.

In the case of Layfette County against Wonderly 92 Fed. Rep. Page 313 the Court said:

> "Where the Legislature has granted a right or extended a privilege of every member of a class and made no exception the conclusive presumption is that it intended to make none and it is not the province of the Court so to do."

In the case of Beadles vs. Fry 82 Pac. Rep. Page 1041 after quoting the Oklahoma Statute relative to the judgments becoming dormant the Court said:

> "It is insisted, however, by the plaintiff, that the above statute has no reference to a judgment against a municipality; and that. under the law an ordinary execution may not be issued on a judgment against a city of the first class. Upon this question there is a division of opinion; some courts holding from principle, and others by reason of statutory provisions, that an execution cannot issue against a city, while others maintain that a judgment creditor may sue out an execution against a city the same as against any other judgment debtor. It is stated in the brief of the defendants that we have no statute upon the subject. The statement is not denied by the plaintiff, and we have been unable to find any which authorizes the issuance of an execution against a city, or which denies the authority to have one issued. Hence the question must be determined from general principles. It has been held that one cannot sue a state, or any of its political sub-divisions, for debt, without express authority granted either in the constitution or by legislative enactment. Oklahoma Agricultural and Mechanical College v. Willis, 6 Okla. 593, 40 L. R. A. 677, 52

Pac. 921. But when the statute grants the authority to sue a political subdivision of a state, that authority also carries with it the implied right to the aid of legal process to collect any judgment which may be rendered in the action. We fully appreciate the necessity of such rules as will enable the city officers to conduct the affairs of government without undue embarrassment; and public policy demands that property which is necessary to the due administration of the city, or which is dedicated to a public use, or the revenue belonging to the different funds, whether collected or not, cannot be seized under execution. It frequently happens, however, that a city is possessed of property both real and personal, which is not, nor ever can be, needed for municipal use, the appropriation of which to the city's debts could not in any way affect the public. Such property, by the great weight of authority, is treated as the private assets of the city, and may be levied upon and sold under an ordinary execution. Mr. Dillon, in his work on Municipal Corporations, vol. 2, 3d ed., p. 572, says: 'On principle, in the absence of statutory provision, it would seem to be a sound view to hold that the right to contract and the power to be sued give the creditors a right to recover judgment; that judgments should be enforceable by execution against the strictly private property of the (city) corporation, but not against property owned

or used by the corporation for public purposes.' This same rule is also recognized by the following authorities:

2 Beach, Pub. Corp., No. 1422, p. 1380.
17 Cyc., No. 9a, p. 979.
Klein vs. New Orleans, 99 U. S. 149, 25 L. ed. 430.
Hart vs. New Orleans, 12 Fed. 292.
State ex rel. Courter vs. Buckles, 8 Ind. App. 282; 52 Am. St. Rep. 476, 35 N. E. 846.
Laredo vs. Benavides (Tex. Civ. App.), 25 S. W. 482.
Murphree vs. Mobile, 108 Ala. 663, 18 So. 740.
Holladay vs. Frisbie, 15 Cal. 631.

As to whether property is reasonably necessary for public use must ultimately be determined by the court, and in case of doubt it should be resolved in favor of the city, for the interests of the individual must be subservient to the due and proper administration of government. In other words, as the revenues of a city must, in a large measure, be raised by taxation, the creditor will be required to wait for payment rather than to permit him to embarrass the corporation by selling property needed for the public welfare. The creditor may sue out an execution and search for property subject to sale as in other cases. The statute has no exceptions as to a city."

Article 19 of the Code of Civil Proceedure of

Oklahoma Territory provides the manner of reviving actions upon the death of any of the parties to an action, and Section 4325, Statutes of Oklahoma, 1893, is as follows:

> "An order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representative or successor unless in one year from the time it could have been first made."

And Section 4332 statutes of Oklahoma 1893 provides:

> "If a judgment becomes dormant it may be revived in the same manner as prescribed for reviving actions before judgments."

These statutes were adopted from the State of Kansas as was also Sec. 4337 statutes of Oklahoma 1893, above quoted.

The Supreme Court of Kansas has frequently construed all of these statutes. In Angell vs. Martin 24 Kan. 334 it is held:

> "A dormant judgment cannot be revived without the consent of the plaintiff unless such revivor is applied for within one year after the same has become dormant."

And the Supreme Court of Kansas has steadfastly adhered to the same doctrine in a long line of cases down to the present time, and it has

held also the doctrine that statutory revivor is exclusive of all other remedies.

Myers vs. Kotham 29 Kan. 19.
Tefft vs. Citizens Bank 36 Kan. 457.
Mawhinney vs. Doane 40 Kan. 681.
Tibbetts vs. Deck 41 Kan. 492.
Bradford vs. Loan Co. 47 Kan. 587.
Raff vs. State 48 Kan. 45.
Rail Road Co., vs. Butts 55 Kan. 661.
New Hampshire Bank Company vs. Ball 57 Kan. 812.
Reeves vs. Long 63 Kan. 700.
Steinback vs. Murphy 70 Kan. 487.

As to the necessity of reviving judgments against municipal corporations within the statutory periods of time so far as we are aware, the Supreme Court of Kansas prior to the adoption of the code in Oklahoma 1893 made no direct declaration, however, the Kansas statutes have been construed by the Federal Court directly upon this question and in the case of Brockway vs. Oswego Township 4 Pac. 79 the Supreme Court of Kansas had under consideration a motion to revive a judgment against a municipal corporation. This case was decided on a question of service, the point contended for in this case that this class of

judgments is exempt from the statute of limitations, not having been argued by counsel or noticed by the Court.

In the case of Ware vs. Pleasant Grove Township 59 Pac. 1089 it is held:

> "An execution can be issued upon a judgment against a Township and, at least, property not used for public purposes can be levied upon and sold thereunder."

This case is a Kansas case decided by the Court of Appeals.

In City of Chanute vs. Frager 132 U. S. 345 it is held:

> "A proceeding in mandamus to compel the levy of a tax to pay a judgment is in the nature of an execution."

And in Field vs. Township of Oswego 28 Fed. Rep. 55. a case decided in the Circuit Court for the District of Kansas in 1886 by Mr. Justice Brewer this precise question was before the Court under the same statutes controlling in this case in an action for mandamus prosecuted to compel the levy of a tax to pay certain judgments against a municipal corporation. On this subject the Court said:

> "These are judgments rendered on township bonds 10 years ago. The last proceed-

ings upon these judgments were in 1878, and they were mandamus proceedings against the township officers. Thereafter, from 1878 until 1885, more than six years, the plaintiffs and relators took no action thereon. Last fall an alternative writ was sued out against the county commissioners of the county of Labette. The question is whether those judgments were alive, so that any proceeding could be had to enforce them. It is settled in this state, both by statutes and decisions, that a judgment becomes dormant in five years, and that an execution issued thereafter is absolutely void. It is true that the statute provides that no execution shall issue against a county, but the proceedings by mandamus is one in the nature of an execution for enforcing the collection of judgments against a municipality. I think, by all fair analogies, the same rule applies; and if a party holding a judgment against a municipality permits it to stand, without any effort to collect it by mandamus proceedings, for five years, the judgment becomes dormant, and there must be a revivor, which can only be had within a year, before any process can be obtained on that judgment. I cannot think it possible that the legislature, by taking away the right to issue execution against the county, meant that a judgment against a county should remain in force indefinitely. It has provided that the judgment should be paid by taxes, and the taxes

enforced by mandamus. The mandamus is the equivalent of an execution, and the same rule must obtain as to all judgments which are permitted to stand for five years without process. They become dormant."

In Dempsey vs. Township of Oswego, 51 Fed. Rep. 97, decided by the Circuit Court of Appeals for the Eighth Circuit in 1892, the Court construed these same statutes, reaching the same conclusion as that reached by Justice Brewer in the case of United States vs. Township of Oswego, supra and in the opinion it is said:

"The statutes of Kansas provide that, if execution shall not be sued out within five years from date of any judgment of record in that state, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant, (Section 4542) that such judgment may be revived by order of the court on application and notice within one year after it becomes dormant; and that, if such order is not made within one year from the time it could first have been made, it shall not be made at all unless by the consent of the debtor or his representatives. Sections 4542, 4537, 4522-4530. In the case at bar no execution could

issue against the defendant township, but the writ of mandamus to enforce collection of judgments against municipalities performs the office of, and is legally the equivalent of, the writ of execution upon judgments against private individuals, since the legislature has provided that these judgments shall not be paid by taxes, and the levy and collection of taxes may be enforced by mandamus. It follows that under the Kansas statutes a judgment against a municipality will become dormant if the creditor permits a period of more than five years to elapse between the rendition of his judgment and the issuance of a writ of mandamus, or between the dates of the issuance of two successive writs of mandamus. U. S. v. Township of Oswego 28 Fed. Rep. 55. Between the 3rd day of June, 1878, and the 16th day of December, 1885, no writ of mandamus was issued upon either of these judgments, nor was any motion or application made within one year after they became dormant, or at all, to revive them. Where a judgment has been permitted to become dormant by the neglect of the creditor to issue the proper writ for five years, and no application or motion to revive is made or suit upon the judgment brought within one year after the expiration of the five years, the Supreme Court of Kansas has uniformly held that the judgment becomes not only dormant, but dead, and no suit can be maintained upon it. See authorities supra. It is not impor-

tant here that the courts of Nebraska have adopted a different rule in the construction of similar statutes. No constitutional rights are here affected, no federal law is in question. The rights of these litigants are governed by these statutes of Kansas, and it is sufficient for this court that the highest court of that state has decided this question."

In Coulan vs. Doull 133 U. S. 596, the court said:

"The rule ordinarily followed in construing statutes is to adopt the construction of the court of the country by whose legislature a statute was originally adopted."

In M'aleer vs. Clay County 42 Fed. Rep. 665 Justice Shiras construing the statutes of Iowa on this subject reaches the same conclusion reached by the State and Federal Courts hereinbefore cited, and applies the same principles applied in this case.

In State ex rel Craig vs. School District No. 225 Neb. 301, and Alter vs. State 62 Neb. 243 the Supreme Court of Nebraska construing similar statutes of that state applies the same principles and reaches the same conclusion.

In Houston vs. Emery 76. Tex 283 it is held that a judgment against a municipality should

be regarded as being within the provision of the statutes providing for a revival by scire facias, or an action of debt, of judgments on which execution was not issued within twelve months after rendition.

In the case of Layfette County vs. Wonderly 92 Fed. Rep. 313 the court said:

> "The contention that the judgment of 1885 could not be revived by scire facias because no execution could be issued upon it, because it was not a lien upon any of the property of the judgment debtor is met by fatal objection that the statutes of Missouri authorized the revivor of all judgments and contained no exceptions. The legislature of that state had the undoubted power and right to except from the benefit of this writ judgments upon which no execution could issue, judgments which created no liens and any other judgments it might specify. And it had the same right and power to authorize the use of the writ to revive all judgments and no exceptions. Where the legislature has granted a right or extended a privilege to every member of a class and made no exception the conclusive presumption is that it intended to make none and it is not in the province of the Court so to do."

In McIver vs. Ragan 2 Wheat, 25 opinion by Chief Justice Marshall the court said:

"Whenever the situation of a party was such as in the opinion of the legislature to furnish a motive for excepting him from the operation of the law the legislature has made the exception. It would be going too far in this Court to add to those exceptions * * * * * * * if this difficulty be produced by the legislative power the same power might provide a remedy but the Courts cannot, on that account insert in the statute of limitations an exception which the statute does not contain. It has never been determined that the impossibility of bringing a case to a successful issue from causes of uncertain duration though created by the legislature shall take such case out of operation of limitations unless the legislature shall so declare its will."

We respectfully submit that the opinion of the Supreme Court of Oklahoma is correct upon the proposition to which we have addressed our argument and that this proposition controls this case; that the opinion is supported by the overwhelming weight of authority and sustained by sound principles of law.

Respectfully submitted,

A. N. WHITESIDE,

Attorney for Appellees and Defendants in Error.

H. B. MARTIN, of Counsel.

IN THE

Supreme Court of the United States

October Term 1906.

J. B. BEADLES,
Plaintiff in Error and Appellant

vs.

A. E. SMYSER, et al,
Defendants in Error and Appellees.

No. 150

REPLY BRIEF OF PLAINTIFF IN ERROR AND APPELLANT

S. H. HARRIS,
FRANK DALE, and
A. G. C. BIEBER,
Attorneys for Plaintiff in Error and Appellant.

IN THE

Supreme Court of the United States

October Term 1906.

J. B. BEADLES,
Plaintiff in Error and Appellant

vs.

A. E. SMYSER, et al,
Defendants in Error and Appellees.

No. 484

REPLY BRIEF OF PLAINTIFF IN ERROR AND APPELLANT

ARGUMENT.

1. THE JURISDICTION OF THIS COURT OVER THIS APPEAL.

The defendants in error are inconsistent in the two propositions which they discuss in their brief in this case. They contend, First: That this court has no jurisdiction of this proceeding upon error and appeal, for the reason that there is not $5,000 involved; while they contend, Second: That the judgments which constitute the matter in dispute in this litigation have *all* become dormant, and are *barred* by the statutes of limitation.

There is no contention but that these judgments amount to more than $16,000. The schedule of them is given in the verified application for the alternative writ of mandamus filed

in the District Court of Noble County, Oklahoma Territory (Record, pages 15 and 16), and the amount stated in the application for the writ as involved in these judgments is $16,207.48. That application is duly verified by the plaintiff J. B. Beadles. (Page 22 of record.)

In the alternative writ of mandamus issued upon this application, after setting out the controversy involved between Beadles and the City of Perry through its officers in detail, with all the particulars thereof, it is alleged (Pages 20 and 29 of record):

"That if the said City of Perry and its said officers are allowed to disregard the law in the premises and to thus repudiate the said judgments so held by this plaintiff, and to decline to recognize the same as valid judgments against the City of Perry, and to pay out the tax money accruing from the said annual levies of five mills so made for the payment of judgments against the City of Perry, and to apply said moneys to the payment of subsequent judgments held by other persons than this plaintiff against the City of Perry, the plaintiff's said judgments will be entirely lost and will be entirely worthless; and the entire amount of said more than $16,000.00 will be lost to this plaintiff; that the plaintiff has no adequate remedy at law, and mandamus is the only remedy by which he can compel the performance of the duty asked to be performed herein on the part of the said defendants, the Mayor, Councilmen and City Treasurer of the said City of Perry."

Thus by the very face of the petition it is shown that all of these judgments are involved in this controversy, and while it is true we stated in the petition for the writ, in the writ, and in our brief as quoted from by counsel, that:

"The city has, without the mandamus, in addition to the contract which it made with the judgment creditors less than five years before this suit was begun and in December, 1901, proceeded each year since then up to 1905 to make a levy of the largest amount which it could make under the statute, to create the judgment fund out of which to pay, and out of which it has regularly paid, outstanding judgments against the City of Perry, and these payments continued until they reached the judgments owned by this plaintiff which are next in order."

It is also true that since the year 1905 and at the time this action was begun by filing the petition, March 12, 1906, (Page 22 of record) and having the writ of mandamus issued the same day (Page 31 of record), and notwithstanding all the facts stated in the petition and the writ, we charged (Page 28 of record):

"The said City of Perry and the said Mayor, Councilmen, and City Treasurer of the City of Perry do each and all decline and refuse to obey the law in the premises, and decline and refuse to recognize the said judgments of this plaintiff as valid and subsisting judgments against the City of Perry, and to apply the money as they come into the hands of the Treasurer of the City of Perry to the liquidation of said judgments, but deny the validity of the said judgments so held by this plaintiff, on the sole ground that the same have become dormant and are barred by the statute of limitation, and that the defendants as the governing officers of the City of Perry, and as the municipal officers thereof, are threatening to continue to so disregard the rights of this plaintiff and to refuse to recognize the said judgments of plaintiff as valid, subsisting and outstanding judgments against the City of Perry and to provide for their payment in manner provided by law, and are threatening to apply the moneys, as they accrue from time to time in the judgment fund of the City of Perry to the payment of other subsequent judgments against the City of Perry, to the total disregard of the aforesaid judgments of this plaintiff, and to pay out and distribute the moneys and funds accruing in said judgment fund of the City of Perry to the payment of other judgments, and that this plaintiff is entitled under the law to have his said judgments considered as valid and subsisting judgments against the City of Perry, and to have the moneys which accrue in said fund either paid out upon said judgments in their order of rendition under the said contract between the judgment creditors of the City of Perry and the said City, or to have the same paid pro rata upon the plaintiff's said judgments, considered together with the other judgments of the City of Perry, both and all of which the said defendants refuse to do."

To these various allegations in the petition and writ of mandamus showing that the entire amount of these several judgments against the City of Perry, in amount more than $16,000.00, were involved in this controversy, the defendant

filed its amended answer to the alternative writ of mandamus on April 2, 1906 (Page 33 of record), in which it stated as its defense:

"That each and all of the judgments set out in the said Alternative Writ of Mandamus have become dormant, through and by the fault and neglect of said plaintiff, as shown by said Alternative Writ of Mandamus; that no execution was ever issued on any of said judgments before said judgments became dormant and that no proceding was ever had or begun by which any of said judgments have been revived, and therefore this action of plaintiff is barred by the statute of limitations.

"Wherefore said defendants pray that the peremptory writ of mandamus prayed for by plaintiff be denied and that plaintiff pay the costs of this action.

"A. N. WHITESIDE,
Attorney for Defendants."

There was no contention, when the defendant filed that anwser, about what was involved in this case. It was *"each and all of the judgments set out in the alternative writ of mandamus,"* and the claim of defendants was that "no execution has ever issued *on any of said judgments,"* and therefore the judgments have become dormant and the plaintiff's action was barred by the statute of limitations. No other controversy was raised in the District Court of Oklahoma, and upon this answer and this contention of defendants that all of these judgments were barred, it obtained a decree of the District Court (Page 37 of record) "that the judgments and each and all of them set out in the alternative writ of mandamus in this cause have become dormant and are barred by the statute of limitations." And it was these judgments that the Supreme Court of Oklahoma was passing upon (Page 42 of record) when in its decision the judgment of the lower court was affirmed.

Our writ of error and appeal in this case was prosecuted under that subdivision of the Section of the Organic Act of Oklahoma passed May 2, 1890, Supp. Rev. St. Vol. 1, page 724, which reads:

"Writs of error and appeals from the final decisions of said Supreme Court shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit Courts of the United States, where the value of the property or the amount in controversy, to be ascertained by oath or affirmation of either party or other competent witness, shall exceed five thousand dollars."

The statement there is that the value of the property "or the amount in controversy to be ascertained by oath or affirmation of either party or other competent witness, shall exceed five thousand dollars." The record shows by the affidavit of J. B. Beadles, plaintiff (Pages 7 and 8 of record) that these judgments in controversy amount to more than $16,000.00, "and that the amount involved in this controversy therefore exceeds five thousand dollars, exclusive of interest and costs."

We claim, therefore, that we have complied not only with the condition of the Act of Congress upon which we may be allowed this proceeding in error and appeal, but that the controversy as shown by the pleadings, evidences a case where more than $5,000.00, exclusive of interest and costs, is involved.

In the case of Schunk vs. Moline, etc., 147 U. S., 500, it was claimed that there was not $2,000.00 involved so that procedings in error could be taken from the United States Circuit Court of Nebraska because only $530.09 of the $2,194.13 was due, it being claimed that inasmuch as the other amount of $1,664.04 of the amount claimed was not due the plaintiff at the time the action was begun, the plaintiff had no cause of action as to this amount, and therefore the amount in controversy was less than the jurisdictional amount. The court in the decision by Mr. Justice Brewer, however, denied this claim in the following language:

"The claim of the plaintiff was to recover $2,194.13 and interest. The right to recover this, or any part thereof, was challenged by the demurrer.

"In Gaines vs. Fuentes et al., 92 U. S. 10, 20, this court said: 'A controversy was involved, in the sense of the statute,

whenever any property or claim of the parties capable of pecuniary estimation was the subject of litigation and was presented by the pleadings for judicial determination.' Hilton vs. Dickinson, 108 U. S. 165.

"Within the letter of the statute there was, therefore, a controversy between citizens of different States, in which the matter in dispute was over the sum or value of two thousand dollars.

"It matters not that, by the showing in the petition, part of this sum was not yet due. Plaintiff insisted that it had a right to recover all. That was its claim, and the claim which was disputed by the defendant. Suppose there were no statute in Nebraska like that referred to, and the plaintiff filed a petition exactly like the one before us, excepting that no attachment was asked for, and the right to recover anything was challenged by demurrer, would not the matter in dispute be the amount claimed in the petition? Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defence, and a good defence, too, would not affect the question as to what was the amount in dispute. Suppose an action were brought on a non-negotiable note for $2,500, the consideration for which was fully stated, in the petition, and which was a sale of lottery tickets, or any other matter distinctly prohibited by statute, can there be a doubt that the Circuit Court would have jurisdiction? There would be presented a claim to recover the $2,500; and whether that claim was sustainable or not, that would be the real sum in dispute. In short, the fact of a valid defence to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say in advance that that defence will be presented by the defendant, or, if presented, sustained by the court?"

So we claim here, the amount involved is not merely the money which was at the time this action was begun in the judgment fund in the hands of the City Treasurer of the City of Perry, amounting to $2,228.96, but all of the moneys which will come into that fund from time to time by the various tax levies made, and which we ask shall continue to be made as heretofore, which these defendants are refusing to make, and up to and including the full payment of all of these

$16,000.00 of judgments, with the interest thereon. The City of Perry is denying the validity of these judgments, denying that it should pay any moneys from the judgment fund, the sum now collected or to be collected thereon, and is denying that these are subsiting judgments against the City of Perry. Therefore the entire amount thereof is involved, and that amount was much more than was required to entitle us to review of the case by this court.

II. ARE THESE JUDGMENTS OF THE CITY OF PERRY DORMANT AND BARRED BY THE STATUTES OF LIMITATION?.

This is the only other question discussed by counsel for defendants in error and appellees, although it is but one of the several questions presented by us in our brief. The fundamental propositions which we presented and upon which we think a decision in this case must turn, that is, that the Oklahoma law provides for collecting judgments by tax levies instead of by execution, and the statutes of limitation do not run against municipal obligations of the character of judgments in Oklahoma under the statutes there, and that the City of Perry has recognized these judgments as valid down to a period much within the five year statute of limitation, and that the City of Perry having by its agreement agreed to pay these judgments in the order of rendition, recognized the subsisting character thereof, and estops it from asserting their invalidity by reason of a want of revivor if that were necessary, are not referred to or discussed by counsel for defendants in error and appellees in their brief.

In quoting Section 4337 of the Statutes of Oklahoma of 1893, on which it is claimed that if execution is not sued out within five years from the date of the judgment, or from the date of an execution thereon the judgment shall become dormant, counsel omitted to quote the remaining portion of the sentence, which is:

"And shall cease to operate as a lien on the estate of the judgment debtor."

Counsel have also omitted to discuss the authority which we presented upon the proposition that this last language of the section referred to should be construed and has been construed by the Supreme Court of Kansas, from whence we adopted this statute, not to be applicable to all characters of judgments, and to permit of exceptions thereto in cases where no lien is sought by the judgment, or could be had thereby upon real estate. We cited the case of Curtis vs. Durien, 46 Kan., 695, where it was stated:

"The provision of the code that a judgment shall become dormant and cease to operate as a lien upon the estate of the debtor when execution has not been taken out for a period of five years has no application to a judgment of this character (injunction)," and that holding was based by the same court upon the proposition "that it was final and perpetual and no execution was necessary to continue it in force."

That is certainly the situation here, for no person will contend, and it is not contended by counsel for defendants in their brief, that an execution is the proper remedy in order to collect these judgments; or if an execution could be had for any purpose, that it could be had for the time-honored purpose of such a writ, that is, to enforce the judgment; and we contend that these judgments could not be enforced by any execuion thereon because the statute has specifically made provision for their enforcement in another, and only in another, manner.

It is our contention, supported by the Kansas case just referred to, that the Kansas statutes on revivor of judgments apply only to such cases as need to be revived. The only decision of any Kansas appellate court which counsel have cited holding that an execution can be issued upon a judgment against a township is that of Ware vs. Pleasant Grove Township, 59 Pac. 1089 (9 Kan. App. 700), and that decision of that appellate court, but which was not the highest court of Kansas, is in direct opposition to far abler decisions upon the

Kansas statute, and made by abler jurists, and should, for that reason, be disregarded.

In the case of Dempsey vs. Township of Oswego, 51 Fed., 97, the decision of the Circuit Court of Appeals, and which decision is in harmony with the opinion by Mr. Justice Brewer in the case of United States vs. Township of Oswego, it is said:

"In the case at bar no execution could issue against the defendant township."

Against these decisions of able jurists upon the Federal Bench we think the Kansas Court of Appeals decisions ought not to be cited. But even that court of appeals decision, if it were not for these decisions of the Federal courts squarely against it upon the same statute, could have little weight in the determination of this controversy, because it is based upon this declaration of the law of Kansas:

"No provision is made by statute for the collection of a judgment against a township, nor is there any statute prohibiting the issuance of an execution upon a judgment against a township."

The law, we claim, is otherwise in Oklahoma. We have referred the court to the statutes here which make it the plain duty of the mayor and council of cities of the first class like the City of Perry, to make an annual levy to create a sinking fund out of which to pay these judgments, so that we have a statute here which was not in force in Kansas, and which provides the means, other than execution, for the collection of these judgments. Consequently our law has made different provisions, and a different rule should be applied.

That case of Ware vs. Pleasant Grove Township, however, supports our contention that the statute of dormancy or of limitation may be suspended by acts committed or performed by the judgment debtor. In that case it is said:

"A supersedeas bond executed on behalf of a township will stay the issuance of an execution upon a judgment against

a township, and suspend the running of the statute of limitations while it is operative."

The defense there made against the mandamus upon the judgment was that it was barred by the statute of limitation, just as it is here, but it was held even under the Kansas statute, where there was no provision for an annual levy to create a fund to pay judgments, and even where it was held by that court that an execution could issue upon the judgment, that the statute of limitation was suspended by the giving of a supersedeas bond to stay the collection of the judgment. That supersedeas bond is simply a contract to pay if the judgment of the lower court is affirmed. Why should it be any more efficacious to suspend the statute of limitation than a square direct contract made by the City of Perry to pay these judgments in their order of rendition and as fast as the moneys were obtained in the judgment fund with which to pay them, and which contract was made less than five years before this action of mandamus was begun? It seems to us in principle that if the contract of a supersedeas bond would stay the dormancy or limitation statute, a contract like the City of Perry has made should also stay the same statute here if there were no other statutes or decisions, which it seems to us entirely remove this statute of dormancy or limitation from any operation whatever upon these judgments.

The logic of the Dempsey vs. Township of Oswego case and the other cases of the Federal courts cited in harmony therewith it seems to us, is in support of our position in this case. It is there said:

"The writ of mandamus to enforce collection of judgments against municipalities performs the office of, and is legally the equivalent of, the writ of execution upon judgments against private individuals, since the legislature has provided that these judgments shall be paid by taxes, and the levy and collection of the taxes may be enforced by mandamus. It follows that under the Kansas statutes a judgment against a municipality will become dormant if the creditor permits a period of more than five years to elapse between the rendition of his judgment and the issuance of a writ of man-

damus, or between the dates of the issuance of two successive writs of mandamus."

Our legislative provisions for the payment of judgments by taxes are certainly much more direct, specific and positive than the Kansas statutes referred to. They do not require a specific levy each year of not more than a limited amount of five mills, as ours do, from which to pay the judgments, but only that the judgments shall be paid by the levy and collection of taxes. Now, if the issuance of a mandamus under the Kansas statute, to compel the carrying out of the provision of those statutes will suspend the statute of limitation, then, it seems to us in principle, that the voluntary compliance by the city authorities with a direct statute requiring annual levies to pay these judgments and *without the issuance of a mandamus*, should have the same effect, for a mandamus is only a writ to require a thing to be done which it is the duty of the officers to do, and how could the issuance of a writ to compel the doing of a thing be more efficacious in the protection of the right of the party who had a right to have the thing done, than if the thing were done without such compulsion?

It is the very fact that the City of Perry did continue to observe the law with reference to these judgments and to recognize their validity down to the year 1905 that prevented the issuance of a mandamus during the period from the date of the creditors' contract in December, 1901, down to 1905, when this controversy with the City of Perry began.

The case of Lafayette County vs. Wonderly, 92 Fed., 313, recognizes the principle so often announced in the Federal courts that a writ of mandamus to compel the levy of a tax to pay a municipal judgment is equivalent to a writ of execution upon judgments against private individuals. Shortly following the part of that opinion quoted by counsel for appellee it is said:

"But even if an execution were not issuable upon this judgment, and if the statute excepted, as it does not, judgments upon which an execution could not issue, a writ of mandamus was certainly available to compel a levy of a tax to

pay the judgment; and upon this ground the judgment against the county would fall within the intent of the legislature, and the spirit and meaning of this statute, because the writ of mandamus to enforce the collection of judgments against municipalities performs the office and is legally the equivalent of the writ of execution upon judgments against private individuals."

And it will be observed that in the various decisions on this line the enforcement of municipal judgments by mandamus is likened to the enforcement of private judgments against individuals. And as to individuals as well as municipalities we have seen the enjoining of the judgment or the suspending of its enforcement by supersedeas bond will suspend the statute of limitation. If that is true, why in principle should not the full compliance with the law for a number of years in the levy of a tax to pay the judgments in full recognition of the judgments so far as the law will permit, and besides all this the making of an express written contract by resolution of the city council of the city to pay the judgments of the city in their order of rendition and the carrying out of that contract, also suspend the statutes of limitation so long as these acts are being performed, particularly so when it was the very observance of such statutes and the compliance with such contracts that prevented the only execution which could, we think, properly be had, or which could under the facts alleged, have been of the slightest avail, that is, a mandamus, which would not lie or could not have been sued out until within one year from the time we did sue it out, because of the compliance with the law, the recognition of these judgments, and the observance of the contract of the city made within the limitation period.

We respectfully submit that the statutes of Oklahoma specifically requiring that these municipal judgments shall be paid by annual levies of limited amount to provide a sinking or judgment fund with which to pay these judgments, and the fact that these statutes were observed down to within a year of the time when the City of Perry first attempted to repudiate these judgments and deny the rights of the plaintiff there-

in, and the decision of the Supreme Court of Oklahoma expressly holding that the statutes of limitation did not run against municipal obligations in Oklahoma, and the decision of this court and of the Kansas Supreme Court referred to with reference to the propositions here involved, control this case and that this judgment should be reversed and a determination made in harmony with the other decisions of the Supreme Court of Oklahoma with reference to the obligations of municipalities in Oklahoma to pay their debts without reference to the lapse of time in which they have failed to pay them, and in harmony with the approval of such decisions by this court, and that the judgment of the Supreme Court of Oklahoma should be reversed, which we very respectfully ask.

S. H. HARRIS,
FRANK DALE, and
A. G. C. BIERER.
Attorneys for Plaintiff in Error and Appellant.